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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. ~~226~~. 8

MEMPHIS & CHARLESTON RAILWAY COMPANY, Appellant,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM et al.,
Appellees.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLEES.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 276.

MEMPHIS & CHARLESTON RAILWAY COMPANY, Appellant,

v.

C. L. PACE, G. C. STEPHENS, R. C. GRISHAM et al.,
Appellees.

Appeal from the Supreme Court of the State of Mississippi.

BRIEF FOR APPELLEES.

MAY IT PLEASE THE COURT:

SUPPLEMENTAL STATEMENT.

I.

The Memphis & Charleston Railway Company, on this appeal, attacks the validity of certain assessments against it in the Oldham Road District of Tishomingo County, State of Mississippi, under the due-process clause and the equal-protection clause of the Fourteenth Amendment to the Constitution of the United States. Such attack, for

all substantial intents and purposes, involves two issues and two issues only:

First. Whether or not Chapter 277, Laws of Mississippi of 1920, is in violation of such clauses of the Fourteenth Amendment, or either of same, as construed by the Supreme Court of the State of Mississippi.

Second. Whether or not the size, character and organization of the Oldham Road District is so palpably arbitrary, discriminatory and confiscatory as to deprive appellant of its property without due process of law.

Appellant, the Memphis & Charleston Railway Company, is a subsidiary corporation of the Southern Railway System, extending from the Alabama line through the State of Mississippi, and constitutes a link or segment in the main line of the Southern Railway System from New York City to Memphis, Tennessee.

Appellees are the Sheriff of Tishomingo County, State of Mississippi and the Board of Supervisors of said county and state.

For all practical purposes, we may say that the Memphis & Charleston Railway Company was complainant in the original cause and is now appellant in this tribunal, and that said Oldham Road District was defendant in the lower court and is now appellee here.

Incidentally, and in so far as may be necessary for the Court's consideration, this cause also involves the validity under the Fourteenth Amendment to the United States Constitution of certain Validation Acts adopted by the

Legislature of the State of Mississippi, at its regular session in the year 1926, as follows, to wit:

a. Chapter 278, Laws of Mississippi of 1926. b. Chapter 1080, Laws of Mississippi of 1926.

Such statutes are printed in full in the official transcript, Rec., pp. 188 and 193, respectively.

Complainant's attack on the various statutes of the State of Mississippi as violative of its constitution has been settled and precluded by the decision of the Supreme Court of said state.

The aforesaid Validation Acts were adopted by the Legislature of the State of Mississippi immediately after the decision of this tribunal, in Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330, commonly known as the "Texas Road Case" or "Archer County Case."

II.

OPINION OF THE COURT BELOW.

This case is reported as Memphis & Charleston Railway Company v. Bullen, 154 Miss. 536, 121 So. 826.

The original opinion of Division B, Supreme Court of Mississippi, was rendered through Justice Anderson on December 22, 1928 (Rec., pp. 211-15).

The final opinion by the Court, en banc, in response to suggestions of error submitted both by appellant and by appellees, and reconsideration accordingly, was rendered on April 15, 1929, also through Justice Anderson (Rec., pp. 231-247).

III.

The Supreme Court of the United States, under Section 237a of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (43 Stat. 937), 28 U. S. C. 344a (as in effect prior to the Act of January 31, 1928, 28 U. S. C. 861a, 861b, Chapter 14, 45 Stat. 54, or the Amendatory Act of April 26, 1928, 28 U. S. C. 861b, Chapter 440, 45 Stat. 466), and pursuant to the provisions of the said last two mentioned acts of the year 1928, took cognizance or probable jurisdiction of the cause in due course, and it is now subject to such consideration at this time

IV.

HISTORY OF CAUSE.

The Oldham Road District of Tishomingo County, State of Mississippi, was organized under Chapter 277, Laws of Mississippi of 1920, by the Board of Supervisors of said county on the 4th day of February, 1926, with a bond issue of six thousand five hundred dollars ($6,500.00), for the construction of roads in such district.

The petition under the aforesaid statute for such district was filed with the Clerk of the Board of Supervisors on the 4th day of January, 1926, and the organization of the district was completed as stated herein, after an election and after full compliance with all statutory requirements for such purpose.

On the 13th day of May, 1927, appellant filed a bill for injunction in the Chancery Court of said county and state, attacking the constitutionality of Chapter 277, Laws of Mississippi of 1920, under the Fourteenth Amendment to the Federal Constitution (Rec., pp. 3-18).

On such bill, a temporary writ of injunction was secured on fiat of Hon. Allen Cox, Chancellor, who is now United States Judge of the Northern District of the State of Mississippi (Rec., p. 17).

Certain amendments were made by complainant in that court to such original bill (Rec., p. 17).

Defendants in such court in due time filed an answer to said original bill and amendments thereto, but later substituted therefor an amended answer (Rec., pp. 18-35).

After certain motions and orders thereon, not material for consideration by this tribunal, the cause was then submitted to the equity court or Chancery Court on such pleadings and on the facts in evidence.

No depositions were taken, but the cause was tried on oral evidence and exhibits in open court (Rec., pp. 38-205).

Final decree was rendered by the Chancery Court against complainant on the 11th day of February, 1928, dissolving the temporary injunction and dismissing the original bill, including amendments thereto.

From such decree, appeal was taken by complainant below to the Supreme Court of the State of Mississippi on the usual assignments of error (Rec., pp. 206-209).

The result of such appeal appears in the Court's decision, en banc, as aforesaid.

BRIEF.

I.

The tax of which appellant complains is not violative of the protective clauses of the Constitution merely because the statute under which the district was organized fails to provide the taxpayer with an opportunity to be heard.

St. Louis & S. W. Ry. v. Nattin, 277 U. S. 157, 72 L. Ed. 830;
Valley Farms Co. v. Westchester County, 261 U. S. 155;
Hancock v. Muskogee, 250 U. S. 454.

II.

The assailed tax was general and ad valorem. Its legality therefore does not depend upon the receipt of any special benefit by the taxpayer.

St. L. & S. W. Ry. v. Nattin, 277 U. S. 157.

III.

The Oldham Road District was organized by the Board of Supervisors of Tishomingo County, Mississippi. That board is, subordinate to the State Legislature, the governing body of the county, empowered by the Legislature to create ad valorem taxing road districts, and, with the ap-

proval of a popular vote, construct roads and issue bonds therefor.

Constitution of Mississippi, Sec. 170;
Laws Miss. 1920, Chapter 277;
St. L. & S. W. Ry. Co. v. Nattin, 277 U. S. 157.

IV.

Any interested party may take an appeal from any order of the Board of Supervisors.

Hemingway's Miss. Code 1927, Secs. 60, 61.

If appellant had any just cause for complaint when this district was organized, early in 1926, it should have been asserted, by appeal or otherwise, before the bonds of the district were issued. The filing of the bill of complaint should not have been delayed until May 13, 1927.

V.

In establishing its system of roads through the subordinate agency of road districts the State of Mississippi was not restricted to the organization of benefit districts only. It had full authority, as a sovereign state, to organize general taxing ad valorem districts.

French v. Barber Asphalt Paving Co., 181 U. S. 324;

Houck v. Little River Drainage Dist., 239 U. S 254;
Mo. Pac. R. Co. v. Western Crawford Road Dist., 266 U. S. 187, 190;
St. L. & S. W. Ry. Co. v. Nattin, 277 U. S. 157.

VI.

All questions having to do with the original creation of the Oldham Road District of Tishomingo County are foreclosed by the judgment of the Supreme Court of Mississippi.

Appellant's Statement as to Jurisdiction on Appeal, p. 6;
Memphis & Charleston Ry. Co. v. Bullen, 154 Miss. 536, 121 So. 826.

(Rec., pp. 231-247.)

VII.

The tax is not "capricious, arbitrary and discriminatory" because it is laid on personal property as well as on real estate. The district is not a benefit assessment district, levying assessments on benefited lands only. It is a general taxing district of the state, levying ad valorem taxes on all forms of taxable property.

All property is benefited by good roads.

Branson v. Bush, 251 U. S. 182;
Kansas City Southern Ry. Co. v. Road Imp. Dist. No. 3, 266 U. S. 379;
Mo. Pac. R. Co. v. Western Crawford Road Dist., 266 U. S. 187.

VIII.

The facts set out in the record clearly indicate that the assailed tax is not palpably arbitrary, plainly abusive and manifestly discriminatory, so as to cause it to offend against the protective clauses of the Constitution.

See our brief and argument on the facts, infra.

IX.

Mississippi's system of roads has been developed, for the most part, under four acts similar in all their essential features.

Laws Miss. 1910, Chapter 149;
Laws Miss. 1912, Chapter 145;
Laws Miss. 1914, Chapter 176;
Laws Miss. 1920, Chapter 277.

The Act of 1914 was assailed as being unconstitutional, but was upheld in

Prather v. Googe, 108 Miss. 670, 67 So. 156.

See also

G. & S. I. Ry. Co. v. Duckworth, 280 Fed. 733, 286 Fed. 645.

For the courts now to hold that the Oldham Road District was organized under an invalid act would paralyze hundreds of road districts and strike down millions in their public securities now owned by investors all over the country.

V.

THE QUESTIONS PRESENTED ON THIS APPEAL ARE SETTLED,

we respectfully submit, by the decision in

St. L. & S. W. Ry. v. Nattin, 277 U. S. 157, 72 L. Ed. 830, and cases there cited.

a. Because the validity of the Mississippi statute is challenged upon the ground that it fails to provide the taxpayer with proper opportunity to be heard. But, in the language of this Court (p. 159), "a sufficient short answer is that, under the repeated decisions here, this is not essential."

Citing:

Valley Farms Co. v. Westchester County, 261 U. S. 155;
Hancock v. Muskogee, 250 U. S. 454.

b. "As the assailed tax was general and ad valorem, its legality does not depend upon the receipt of any special benefit by the taxpayer."

St. L. & S. W. Ry. v. Nattin, supra.

c. A county board of supervisors in Mississippi is, subordinate to the state Legislature, the governing body of the county, just as "in Louisiana the police jury, subordinate to the state Legislature, is the governing body of the parish, and statutes of the state empower these juries to create road districts from such portions of their parishes as they may determine and, with the approval of a popular vote, to construct roads and issue bonds to pay therefor." Likewise, the Mississippi statutes now under attack

(particularly chapter 277 of 1920) empowered boards of supervisors to create road districts from such portions of their counties as they might determine and, with the approval of a popular vote, to construct roads and issue bonds to pay therefor.

Appellant's brief continues its attack upon the road system of Mississippi, although it has admitted, in its "Statement as to Jurisdiction on Appeal," that the "judgment of the state's highest court foreclosed a review in this Court of all technical questions considered below having to do with the original creation of the special district * * *" (p. 6, Statement as to Jurisdiction). It lays great stress on certain facts (while ignoring others), and makes these facts the basis for the argument that the tax against itself is so excessive and discriminatory that it, **the tax**, violates the protection afforded by the due-process and equal-protection clauses of the Fourteenth Amendment to the Constitution. But, interwoven with this is the further argument that the act itself under which the district is organized is void. This, of course, does not necessarily follow. And, with all due deference to our adversaries, we must insist that this is a nonsequitur, and indicates that appellant is not so much interested in the relatively petty tax involved in this case, as in destroying the acts under which the whole Mississippi road system has been built up. But the highest court in Mississippi sustained the district as having been lawfully organized as a taxing district of the state, under a valid statute; and therefore we must insist that the only question before the Court is not whether the act under which the district was organized is a valid legislative enactment, but whether the tax levied against this appellant, and it only, is an unlawful tax as

being violative of the protective clauses of the Constitution.

This is not a benefit assessment district, levying assessments on benefited lands only. It is a general taxing district of the state, levying ad valorem taxes on all forms of taxable property.

All property is benefited by good roads.

It does not necessarily follow that, because personal property in a lawfully-created road district is one of the subjects of taxation for roads, the tax is for that reason "capricious, arbitrary and discriminatory."

Appellant bases its appeal upon two assignments of error which, we respectfully submit, contain certain misconceptions. For example: That the State of Mississippi may not tax appellant railroad ad valorem, but only in proportion to "the specific benefits" to its property. In other words, that the state must be restricted to the organization of benefit districts only, and must not organize general taxing (ad valorem) districts. Secondly, that the state may not tax appellant's personal property in this district because (it is asserted) personal property is not benefited by roads.

We respectfully submit that both these bases for the first assignment of error are without foundation in law. The state may organize taxing districts of either or both types, and good roads bring benefits to personal property as well as to real estate. We therefore respectfully submit that the Mississippi road statutes (chapter 277 of 1920 and chapters 278 and 1080 of 1926), as applied to appellant, are not void for either of the above reasons, nor was the Supreme Court of that state in error in so holding.

BRIEF ON THE FACTS.

Maps of Tishomingo County, Mississippi, and of the Oldham Road District, including certain additional territory contiguous thereto, appear in the official transcript (Rec., pp. 204-205).

The Oldham road and the Gravel Siding road appear on the second map in red.

Such roads run, speaking in general terms, from what is called the Free Bridge road on the north to Gravel Siding at appellant's track or right of way on the south, and to the Village of Oldham also on the south or southeast, respectively, such latter road crossing the railroad track at right angles.

This system of roads in such district runs from the Free Bridge road south in one link, for approximately one-half of a mile, then dividing or branching out in two forks as aforesaid. Such roads are not parallel with appellant's right of way, but are more or less right-angle roads throughout the entire system to said right of way.

Complainant's bill in the Chancery Court of Tishomingo County, State of Mississippi, while attacking such district as unreasonable and arbitrary, does not undertake to designate any contiguous territory which should have been included.

Upon the contrary, C. N. Freeman, tax agent of the Southern Railway System, including the Memphis & Charleston Railway Company, testifying as a witness on

behalf of complainant, was unable to indicate any territory to the exclusion of which objection was made (Rec., p. 125).

> "Q. Do you know, or can you designate to the Court, any territory that was excluded in the organization of the Oldham Road District which ought, in your opinion, to have been included?
>
> A. No, sir; I cannot."

This same witness, Freeman, under cross-examination was unable to state any assets, personal property, or franchises in said district, subject to assessment that escaped taxation (Rec., pp. 124-126).

He was complainant's chief witness on the question or supposed question of discriminatory taxation against complainant, but the extent of his knowledge of conditions and values in the Oldham Road District was acquired by passing through said district in the berth of a Pullman car, "something like three o'clock in the morning" (Rec., p. 124).

In acreage, this is a small district, only about 2,950 acres, but it is a district of vast magnitude and importance to appellant because of the fact that it contains within its limits the two great gravel pits of North Mississippi, from which "Tishomingo Gravel" is shipped over the country for the construction of roads and other purposes, under the testimony perhaps one of the most important segments or divisions of the entire Southern Rail-

way System in its business and revenue producing power.

The Oldham Road District under the statutes of the State of Mississippi was not a Betterment District or Special Improvement District, but was an Ad Valorem District under Chapter 277, Laws of Mississippi of 1920, and under the decision of the Supreme Court of said state in the instant case (Rec., pp. 239-240).

The chief assault in the courts of Mississippi on the organization of this district is based on the contention that the Board of Supervisors of Tishomingo County had, as in the "Texas Road Case," no discretion to deny to petitioners the organization of such district; but the Court's opinion settles such contention against appellant, both in that court and in this court (Rec., pp. 236-238).

Complainant in its original bill also made attack on this district, claiming in effect that it was too **small**; but, in this tribunal, by its brief it substantially claims that the district is too **large** because of the fact that certain parts of section 29, township 3, range 11 east, of Tishomingo County, were not properly included in said district by virtue of the fact that no road was constructed in or through such section.

However, appellant, through its chief witness, Freeman, in the trial court specifically stated that he could not designate any territory to the exclusion of which objection was made (Rec., p. 125).

Furthermore, any such contention carries with it the demand, for the validity of every road district and all road bonds, that a road must be constructed in or through

every section of land in such district—an impossible proposition.

This situation admirably illustrates appellant's inconsistency.

The inclusion of the railroad's right of way and tracks from the eastern boundary line to the western boundary line of the Oldham Road District was not an arbitrary selection of such property for the purposes of taxation, but was merely in effect an extension of the road district from its limits on the north to the Lee highway on the south, extending from Washington, D. C., to Houston, Texas.

The manifest theory of appellant is that the organization of the district should have been extended from its northern limits to a line immediately north of the railroad right of way, thereby giving to appellant the vast benefit and advantage of the great gravel pits of this district without any liability whatever for the maintenance of its road system, absolutely essential, under the testimony, to the labor organization upon which the continued productivity of such pits must necessarily depend.

It is true, under the decision of the Supreme Court of Mississippi, in the instant case, and also in other cases, that the Board of Supervisors of various counties of such state are without power to modify the proposed boundaries of a road district as selected by the petitioners therefor; but the right of the Board of Supervisors to deny the petition for the organization of any such district

affords protection against the arbitrary procedure available to petitioners under the statutes of other states, noticeably the State of Texas, prior to its present statutes.

Appellant, in its brief, urges, in effect, the invalidity of Chapter 277, Laws of Mississippi of 1920, stating that after a favorable vote in the election for the organization of road districts "* * * the Board of Supervisors, who constitute the governing body of the county, shall organize the special district, **comprising only the boundaries especially named in the original petition** and issue the bonds thereof; the proceeds of which are to be used **only for the construction and maintenance of specially designated roads in the district.**"

We, therefore, ask, "specially designated" by whom?

The Mississippi statute answers this inquiry conclusively against appellant in the very citation employed by appellant in its brief.

In the first place, the statute cited by appellant does not, anywhere, refer to any road or roads as **special roads** or **specially designated roads**, but merely says:

> "That the Board of Supervisors of any county in this state are hereby authorized and empowered to construct or construct and maintain, or maintain one or more highways for the convenience of the traveling public * * *."

Petitioners have no right or power whatever to select or designate such highways, for that is a discretionary

power in the Board of Supervisors, over which petitioners have no control.

It, therefore, follows that the statutory system of the State of Mississippi for its road districts does not contemplate **specially designated roads**, as appellant's brief appears to indicate, subject to selection by petitioners, but merely **one or more highways**, in the discretion of the Board of Supervisors and subject to their exclusive authority under Section 170, Constitution of the State of Mississippi of 1890.

In connection with the facts of the instant case, we note the observations of the Court in Wight v. Police Jury of the Parish of Avoyelles, Louisiana, et al., 264 Fed. 705, which was decided by the C. C. A. (Fifth Circuit), on the 18th day of June, A. D. 1919. The Court there discussed in considerable detail the modern conditions resulting from new methods of communication, transportation and commerce, as distinguishing elements of civilization, and for the development of which highways are essential.

"The construction and maintenance of good roads has been accepted universally as a function of government."

The Court well says that road districts do not ordinarily take the form of improvement districts or betterment districts based on local benefits, but follow the theory of ad valorem assessments and taxation, because of the fact that roads are the avenues or arteries of transportation and commerce.

Roads cost money, and money is available for such purpose only through taxation.

If railroad corporations and other corporations are to be exempt from taxation for these purposes, then our entire system of highways must soon collapse.

Of course, we do have certain classes of improvement districts not supported by direct taxation, such as drainage districts, street paving districts and other districts of that character, but for all practical purposes our entire system of modern highways all over this country, in every state, is being constructed and maintained by ad valorem taxation.

The Court, in the Wight case, supra, well says, with reference to these road districts:

> "There is an absolute presumption of benefit from governmental activities of this character."

Inequality is inherent in all taxation and in all governmental activities.

Approximate equity and justice is all that we can ever hope to attain in taxation.

The property of bachelors and of maiden ladies is assessed for the education of children.

Transportation is just as much a function of civil government as education.

In the instant case we have a district of unusual merit, small, but compact and important in the enormous volume of its resources and business.

It means prosperity and wealth to appellant and its owners, who are delighted to receive the benefits of such district, but seem determined to repudiate its obligations.

As to the value, advantage or benefits of this road system in Tishomingo County, appellant insists that no such value or benefit accrued to the Memphis & Charleston Railway Company. That was, however, an issue under the pleadings and testimony in the lower court, and also in the Supreme Court of the State of Mississippi.

Such issue was decided against appellant by both courts.

Hon. Allen Cox, Chancellor, in connection with his decree dismissing complainant's bill, also rendered a written opinion constituting an official finding of the facts in this case, as follows, to wit:

> "The case to be decided now before the Court is a very grave matter; possibly the most important litigation that has been before a Mississippi Court in the present generation.
>
> "I think the proper thing is for the Court to state what his ideas and findings are with reference to the facts in this case.
>
> "There has been a great deal of testimony in this case since it has been sifted down which, in my opinion, is utterly immaterial to the issues involved.
>
> "The Oldham Road District, as has been shown by the testimony and exhibits in this cause, contains apparently a small amount of improved roads, which is not parallel to the complaining railroad, but which is in the nature of a short lateral road. There can be no question in this lawsuit, under the proof in this

case with reference to this particular district, of any competitive operation of the road in question and of the railroad. The road in question, in my judgment, has a tendency and will tend directly to slightly increase the revenues of the railroad, in that it has opened up a small territory which has furnished and will probably continue to furnish a small amount, at least a comparatively small amount, of pulpwood and timber for shipment over the line of the railroad. I think the testimony in this case shows that indirectly the road will be of some considerable benefit to the railroad, in that it will have a tendency to settle labor conditions and aid in the operation of the two gravel pits within the district, which annually furnish a large amount of tonnage for the complaining road.

"That, in my judgment, is a fair statement of the facts connected with the district, in so far as it touches the question of whether or not the railroad will be benefited directly, and in a sense, indirectly, by securing increased traffic, because of the location of this road.

"When we get to the legal features of this lawsuit, there are some very troublesome questions involved in it, to my mind. I have studied carefully the Archer County, or Browning case, decided in the United States Supreme Court, having tried to analyze that case and apply the holdings of the Court to the facts in this case and to the Mississippi law, and I am of the opinion that the Browning case does not apply, either to the facts of this particular District or to the Mississippi statutes. There is, to all intents and purposes, a finding of fact by the Supreme Court in the Browning case, that the property of the complaining

parties received no benefit whatsoever from the organization of the road district. That, I do not think, is a fact in this case. I think there is a material difference in the Texas road law, which was condemned in that case, and the road law in Mississippi. According to the Texas law, as interpreted by the United States Supreme Court, the action of that County Board was purely ministerial; there was no discretionary power vested in them, no judicial power vested in them, but they must actually organize the district, must issue the bonds, provided a proper petition be filed and an election called, which results in favor of the bond issue.

"I do not so construe this Mississippi statute. I think our Constitution and our statute placed full power over roads, bridges and ferries in our Board of Supervisors, and my judgment is that when a petition, seeking to have the creation of a road district, is filed by the required number of qualified electors, there still remains in the Board of Supervisors the discretionary power to refuse to create that district, if in their sound judgment that district should not be created.

"There is also the right of appeal to the Circuit Court, and from the Circuit Court to the Supreme Court, from every action of our Board of Supervisors, and in my judgment those two conditions differentiate the Mississippi law and the facts in this case, from the law and facts as announced in the Browning case.

"The argument of counsel for the complainant, that the District here in question has issued in the aggregate more than 15 per cent of bonds against its taxable valuation, is a persuasive argument, and was very

forcibly presented, but I am of the opinion that the Supreme Court of Mississippi has, in the case of Wright v. the Board of Supervisors of Lauderdale County, 124 Miss., page 4, settled that question adversely to the contention of complainants in this case.

"A still more persuasive argument was made by counsel for the complainant, that the immense amount of the assessment against the railroad companies for this type of improvement was manifestly unfair and confiscatory, and violates the Fourteenth Amendment to the Federal Constitution. However, I am of the opinion that the State Court and the Federal Court, including the United States Supreme Court, have held that an ad valorem tax placed on all property in the District was one of the fairest measures of ascertaining how taxes should be levied and collected for the majority of districts, such as the one in question, and therefore I think that question is determined contrary to the position of complainant.

"The question then arises as to whether or not the alleged failure on the part of the Board of Supervisors of Tishomingo County to have the proof of publication of the notice of election on file with them when these orders were passed, would make this road district void. Granting, for the sake of argument, that this contention as to the fact be true, I think the Legislature in the validating act, ratifying the proceedings of the Board of Supervisors in creating the Oldham Road District, could do in that validating proceedings anything which they might have done lawfully in the beginning. I think that it was within the power of the Legislature of the State of Mississippi to have provided that it was not necessary to

have on file the proof of publication, but they might have provided that publication could be proven by other methods of proof, such as those that have been introduced into this record this afternoon, and being of the opinion that they could have provided a different and specific method of proving this, I think they had power to ratify it.

"With these views of the Court, it would necessarily follow that complainant's bill must be dismissed.

"Under these views, it is not necessary for me to determine the question of laches or estoppel, which is raised in this lawsuit, and this Court, therefore, says nothing about either of those questions and expresses no opinion on them, because the Court is of the opinion the suit is determined along other lines and on other issues."

The Supreme Court of Mississippi, in its opinion in this case, held on such controverted issue of fact that the assessment against appellant "* * * would benefit appellant's business as a common carrier, both directly and indirectly * * *."

The Court said:

"All property in the district involved in this case, both real and personal, on which an ad valorem tax is levied for general state and county purposes is likewise levied for road purposes of the district. Appellant lays stress on the following facts: The area of the district is 2,950 acres, of which appellant owns only 57.79 acres, which is 1.9 of the whole acreage; the assessed valuation of appellant's property in the

district is 62.39 per cent of the entire assessed valuation of the district. The evidence showed, however, that the proceeds of the bonds issued for the district had been expended on public roads, and none of the roads constructed ran parallel with the appellant's line of railroad, but nearer at right angles with it; that the road district was composed of a little less than five sections, but that the sections were not strung along, one after the other, so as to take in as much of appellant's line of railroad as could be done; and, furthermore, the evidence tended to show, and the Chancellor found as facts, that the improved roads in the district would benefit appellant's business as a common carrier, both directly and indirectly—that the direct benefit would be derived from an increased tonnage for appellant from the gravel mines in the district, which gravel mines were made more accessible to miners by virtue of the improved roads. In other words, that the improved roads increased the labor facilities in the gravel mines to such an extent that the output of the mines would be materially increased, the output of the mines being transported alone over appellant's lines of railroad. We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant. We do not think the cases relied on by appellant at all decisive in favor of appellant's contention."

The aforesaid adjudications by the Chancery Court of Tishomingo County and by the Supreme Court of the State of Mississippi are abundantly supported by the testimony

in this case, especially by the evidence of S. H. Allen, a witness on behalf of defendants, appellees here.

Mr. Allen was general manager of Allen Gravel Company, a corporation engaged in mining gravel, or in the operation of a gravel pit, a civil engineer, a man engaged in the gravel business and familiar with the conditions prevailing in the pits situated in the Oldham Road District for nineteen years, "since 1909" (Rec., p. 162).

He testified that there were two companies or corporations engaged in the operation of these pits in that district—the Allen Gravel Company and the Memphis Stone and Gravel Company (Rec., p. 162).

Because of the weight and value of the testimony of this witness we quote at considerable length therefrom, as follows, to wit:

> "Q. Mr. Allen, are you familiar with the home life and economic conditions, generally, throughout the Oldham Road District?
>
> A. Yes, sir.
>
> Q. How much of your time do you spend out there in that district, Mr. Allen?
>
> A. About 365 days in the year.
>
> Q. That puts you in touch with the citizens and all the conditions out there, does it, Mr. Allen?
>
> A. Yes, sir.
>
> Q. Mr. Allen, through your conference relations with the Memphis Stone and Gravel Company, are you familiar with the (fol. 216) quantity and extent of business done by the Memphis Stone and Gravel Company?

A. Yes, sir; I saw a comparative statement of their tonnage at a rate hearing in Memphis some time last year.

Q. Then, through the shipments and operations out there, are you personally familiar with the business done by them, like you are yours, somewhat?

A. Yes, sir.

Q. Mr. Allen, can you tell the Court what revenues that community affords the Memphis & Charleston Railroad Co., say for the years 1926 and 1927?

A. Well, in 1926, the Allen Gravel Company shipped 200,200 tons; the Memphis Stone and Gravel Company, from their statement I saw——

Complainants object to statement witness saw of Memphis Stone and Gravel Company, because their books can be produced and best evidence.

The Court: I think, when it comes to accurate evidence, their books would be the best evidence, but I think the witness can testify from his own personal observations; he can state whether they shipped large quantities of gravel.

Excepted to.

Q. From your knowledge, are you prepared to say how much gravel they shipped in 1926-27?

A. They shipped the same as we did. In 1927 we shipped 215,000 tons and, from my observations, I would say that the Memphis Stone and Gravel Company possibly shipped from, probably from 15 to 30 tons more than we did in 1927.

Q. Well, in cars, about how much would that run?

A. About 8,000 to 8,500 cars in 1927; about 7,800 to 8,000 cars in 1926.

(fol. 217). Q. Mr. Allen, are you familiar with the destination of these shipments, somewhat?

A. Yes, sir.

Q. About what revenue came to the Railroad, per ton, or per car, would you say?

A. The minimum freight rate we ship gravel on, either the Memphis Stone and Gravel Company, or Allen Gravel Company, is 47 cents per ton, and has been since 1922.

Q. What percentage of those cars do you say they would get the minimum rate on?

A. Possibly a tenth of the shipments.

Q. Where does that go to?

A. Goes to Corinth and Alcorn County. The majority of this gravel is shipped from Gravel Siding or Oldham; either will take an average freight of 70 cents a ton.

Q. An average freight of 70 cents a ton?

A. Yes, sir.

Q. What majority; now what majority——

A. Practically the balance of the shipments; a car of gravel will run, according to our average and Memphis Stone and Gravel Company, from our observations, loads about the same weight, around 57.8 tons per car. That is our general average for the last five years, and figured on a 60-cent freight rate, even, I believe, would—the freight would run around $40.00, or better, per car.

Q. Is that a very conservative estimate?

A. Very conservative; yes, sir.

Q. Mr. Allen, what other revenue or patronage do the citizens of that vicinity, of Oldham Road District, afford the Memphis & Charleston Railway Company?

A. Considerable pulp-wood put on, considerable

lumber (fol. 218) has been loaded in the last year or two at Morrison, south of Oldham.

Q. What relation does the construction of that road have, do you think?

A. It gives the people access to Oldham switch and most of the way to Morrison switch, whereby they could haul material down there and load it much more conveniently and much better than they could have otherwise.

Q. Now, Mr. Allen, does any other railroad get any of the benefits, any revenue or patronage from this vicinity, except this railroad company you speak of?

A. Yes, sir; on joint hauls the other railroad does.

Q. I mean out there?

A. No, sir; no other railroad out there.

Q. Now, Mr. Allen, what freight, incoming freight revenue, comes in that community, as patronage of this Memphis & Charleston Railway Company. Much or little?

A. Not a great amount, Mr. Cunningham, I should imagine; this is only my observation or best judgment; there is probably $20.00 a day incoming freight to the two pits.

Q. And now, to the community around about there?

A. That would be only guess on my part; I could not say.

Q. I believe some of your citizens run a store out there?

A. Yes, sir; one or two little stores out there; two stores out there.

Q. Were they located before or after the improvements in question here?

A. Both located—one located after the improvements, and one before.

Q. Now, Mr. Allen, are you prepared to give us a reasonable estimate of the total revenue afforded to the M. & C. (fol. 219) Railway Company by pits and citizens out there, annually?

A. Well, from the amount of cars have estimated the two pits ship a year, and conservative estimate of the minimum freight, the gravel alone would be something like $250,000 in a year.

Q. You mean freight revenues to the company?

A. Yes, sir.

Q. Memphis & Charleston Railway Company?

A. Yes, sir.

Q. All right, what would you estimate the other, outgoing freight, Mr. Allen?

A. That is hard for me to say, because do not know the freight rates on lumber and pulp-wood and things of that kind.

Q. You hardly willing to make an estimate?

A. Hardly willing to make an estimate, because would be purely guess.

Complainants object to all this testimony in reference to the amount of freight, gravel, being shipped from these two pits, from this witness, the exact amount of freight can be produced from the records, and that has been waived; objection overruled; excepted to.

Mr. Cunningham: What records you mean?

Mr. Mitchell: Records of the M. & C. Railway Company.

The Court: I think the witness hasn't been called on to give absolute figures. Of course, if that was the case, he would have to have the records; he has been called on to give the situation, generally, from his

observations; while his observations may not be binding on the Court, I think he is entitled to put that in the record.

Excepted.

Mr. Cunningham:

[fol. 220] Q. Mr. Allen, is that an accessible record of the number of cars going out from the Allen Gravel Company pit?

A. Yes, sir.

Q. Before we close, will you furnish the exact number of cars as per your record?

A. Yes, sir. Will take me some little time to telephone to Memphis to have them sent out here, but I can send them in a day or two; we have every car we shipped and the exact amount of tonnage.

Q. Well, it is not that necessary to be exact. Now, Mr. Allen, you said the conditions that existed out there previous to these improvements, were bad. What were the road conditions out there previous to this improvement?

A. You mean the general road conditions?

Q. Yes, sir.

A. Well, we had two trunk-line highways built out in that county; one considerably north of the pit, and one south of the railroad, and the Oldham Road District was absolutely a trail, as far as a highway was concerned; people could not get over it very well in the wintertime on account of the mud and bad conditions that existed on it.

Q. Where did your labor live?

A. Practically all my labor lived on the Oldham Road District.

Q. And prior to the construction of the road, did they live in that vicinity?

A. Yes, sir.

Q. What about the labor that operated the Memphis Stone and Gravel Company; where did they live, if you know?

A. Considerable of them lived on the Oldham Road District and considerable lived at Oldham.

Q. The condition you described that surrounded your labor out there, does that have application to [fol. 221] the Memphis Stone & Gravel Co., labor also?

A. Yes, sir; I think it does.

Q. Situated as you were before this improvement out there, that is, the Allen Gravel Company and the Memphis Stone and Gravel Company, what disadvantage were you under relative to keeping labor out there and operating your pits?

A. Well, I couldn't truthfully say what the Memphis Stone and Gravel Company conditions were, because I did not watch their labor to that extent, but it was rather hard for us to keep labor, specifically skilled labor.

Q. Why?

A. Because had no schools and had no roads to go to and from the pit, and it was impossible for us to keep absolutely first-class labor unless we permitted them to live in Iuka, which was very inconvenient, and had it not been for the building of the road and the school, it would have considerably hampered us in the operation of the Allen Gravel Company, and possibly if it had continued for an indefinite length of time, might have put us out of business, for labor.

Q. Now, Mr. Allen, your competitive industries over the country generally; were your competitors so

hampered over the country about their roads and schools, cheaper freight, and things of that kind?

A. No, sir; our competitors at Columbus are located absolutely on a road and located convenient to schools and other competitive concerns.

Complainant objected to conditions of the surroundings and other circumstances of these other gravel pits there and in the State of Mississippi and farther south, and Columbus, going into this record.

By the Court: I think you will have to confine the testimony [fol. 222] along the line of conditions in the Oldham Good Road District, and what effect the building of road in question had or would have on the particular conditions out there, regardless of what might have been in other places.

To which defendants excepted.

Q. Now, Mr. Allen, that unrest you speak of out there among your labor, that you speak of because of the want of roads, and inability to go to school and church, did that unrest—was it manifested in the Memphis Stone & Gravel Co. labor, as well as your labor?

A. Mr. Cunningham, I made the statement a while ago I could not intelligently answer that question, because I am not absolutely familiar with the Memphis Stone & Gravel labor.

Q. Well, did the same conditions and environments surround one pit that did the other?

A. Yes, sir; same conditions and environments surrounded one pit as the other, but whether or not their labor was dissatisfied or not, I could not positively say.

Q. Now, since the construction of this road, has your business increased or decreased?

Complainants except to the foregoing question, on the ground that it is incompetent and irrelevant, not having shown the cause of any decrease or increase in the construction of the Oldham Road District, and in our opinion is not competent on the issues in this case.

By the Court: Gentlemen, I will let you put that in there under a reserved ruling, however with the explanation of the Court: You will have to show, before the Court will consider that much is competent, you will have to show the construction of the road the increase.

Excepted to.

[fol. 223] Q. Has it increased or decreased?

A. Yes, sir; it has increased.

Q. Mr. Allen, could that increase have come about if that same condition of unrest of your labor had existed that you spoke of immediately prior to the construction of this improvement; could that increase have come to you?

A. I do not think we could have increased our business had it not been for the labor being satisfied.

Q. Do you think you could have handled your business?

A. No, sir; I do not.

Q. Was the increase for 1926; has it been small or great?

A. It has been rather considerable; much more so than it was from 1925 to 1926.

Q. What has been the effect of this improvement out there on the development of the community, farms and farm houses and fields and lands?

A. Been considerable improvement in the way of

farm houses being built, and been a little mercantile business established out there and a dairy established since the road was built; been considerable acreage cleared up.

Q. What effect does that have on the revenues of the railroad in that community?

A. I could not say exactly what the exact revenues has been, but the general revenues has been increased on account of that."

This witness knew exactly the shipments by his own organization, the Allen Gravel Company, for the years 1926 and 1927, also for other years.

He knew of his own knowledge the approximate and relative shipments by his competitor, the Memphis Stone and Gravel Company. Such shipments were not competitive business as between different railroad companies, but originated only on appellant's line or lines.

Mr. Allen gave the Court the benefit of his comprehensive knowledge and information, not conjecture, not guesswork, but personal knowledge.

Under such circumstances, thoroughly familiar with the gravel business, a man of intellectual ability, informed on freight rates and other incidents thereto, this witness fixed the approximate gross receipts or freight charges from those gravel pits at $250,000.00 per annum.

The alleged discrimination and confiscation of appellant's property in the Oldham Road District, asserted by appellant in its brief, is based entirely on percentages of **area**, not on **valuations**.

It may be true that said district includes 2.88 miles of the railroad's right of way from east to west (Rec., p. 204).

It may also be true that appellant's main track is assessed by the State Tax Commission in accordance with law at $35,000.00 per mile and its sidetracks at $4,500.00 per mile (Rec., pp. 118-123).

It may also be true that appellant owns only 1.9 per cent of the acreage in the Oldham Road District, and that it is assessed with 62.39 per cent of the taxes within said district (Rec., p. 120).

This does not prove or tend to prove discrimination against appellant.

Acreage is not the basis of ad valorem taxation, but **adjudicated values.**

No evidence in this case establishes that the assessments of the railway company are **too high** or that the assessments of other corporations and individuals in this district are **too low.**

If appellant owned, not in area but in value, 62.39 per cent of the assessable property situated within said district, then its complaint against the assessment attacked in this litigation as arbitrary and confiscatory is without merit.

This is in fact the legal status of such proposition.

The value of appellant's property has been fixed by solemn judgment of the State of Mississippi on a certain basis.

By similar judgment of another department of the state the value of all other property in such district has been settled. Such adjudications constitute final judgments by the respective taxing authorities of said state, from which no appeals have been taken.

Appellant has acquiesced in such assessment and has paid all other taxes in Tishomingo County, both state taxes and county taxes, on the basis of such assessment.

The fact that its land may have been assessed on a valuation of $1,958.00 per acre under such judgment, while other lands have been assessed at a valuation of $23.00 per acre under a valid judgment accordingly to which no objection is made in this record, is absolutely immaterial in the instant cause.

If appellant pays 14 per cent of all taxes in Tishomingo County, that is because under the adjudication and judgment of the State of Mississippi, it owns 14 per cent of all property in Tishomingo County, in value.

If it pays 27 per cent of all taxes in the first district of that county, such taxation results from the adjudicated ownership of 27 per cent of the value of all property therein.

If it pays 37 per cent of all taxes in the Lee Highway District of said county, that is because it owns 37 per cent thereof under a valid judgment rendered by the taxing authorities of the State of Mississippi with the consent and acquiescence of the Memphis & Charleston Railway Company.

Its complaint against an assessment of 62 per cent approximately in what it calls a "special district" where it owns approximately 2 per cent of the land therein contains just two fallacies.

First. The Oldham Road District is not a special district, or betterment district, but is an ad valorem district.

Second. All ad valorem taxation is based, not on area or acreage, but on values.

Any individual or corporation might own 2% in area of all land in a given territory, but because of extensive improvements thereon, the value of such property for taxation might be 62% or 80% or 90% of all property in such district.

If appellant and its affiliated corporations paid during the year 1926, taxes in the "enormous sum of $10,350,000," that must have been because such corporations owned sufficient property in the various states where they do business to justify the imposition of such taxes.

Appellees did not institute these proceedings, but appellant was complainant by its original bill and amendments thereto in the trial court.

The burden of proof was, therefore, on the Memphis & Charleston Railway Company, as such complainant, to maintain, by testimony, the allegations and issues of such bill.

The sole theory of appellant's case in the trial court was that taxation without benefit or advantage to its property would result in the arbitrary confiscation thereof.

That was an issue of fact.

Appellant having, by its bill, submitted such issue to the trial court for adjudication, was under obligation to show that such assessment and taxation was arbitrary and that its property had not received and did not receive commensurate benefits or advantage therefrom.

With able and distinguished counsel, fully advised of its rights, appellant wholly failed to maintain its position by evidence and to meet the burden of proof, under its original bill.

The Memphis & Charleston Railway Company, from the date when its original bill was filed, May 13, 1927, down to the trial of this case in the lower court, on the 11th day of February, 1928, with the administration of its freight department, its passenger department, and its various accounting departments, subject to the advice and instructions of its legal department, made no effort whatever, by comparative records, to maintain its position.

If taxation against appellant in the Oldham Road District was arbitrary and confiscatory, its records would have shed great light on such affirmative allegation of its original bill.

Appellant could, of course, if it had desired to do so, given to that Court and to this Court the exact gross receipts and net revenue to it from all shipments out of the Oldham Road District.

For purposes of their own, appellant did not divulge such information by the testimony of its efficient experts.

This record, therefore, shows that the approximate gross

revenue or receipts to the railroad company from the Oldham Road District must have been probably two hundred fifty thousand dollars ($250,000.00) per annum, and perhaps more than that, including other incidental income.

Against this enormous revenue, appellant now protests the payment of taxes on the bonds of such district in the modest amount of four hundred fifty dollars ($450.00) per annum.

Under the testimony of C. N. Freeman in this record, appellant's tax commissioner, this company would have had to pay the approximate **principal** of four thousand dollars ($4,000.00) on these bonds, an infinitesimal sum in comparison with the wonderful business derived from that territory and the assets thereof.

We are living now in a new day. Every intelligent executive of these great railroad organizations must recognize this condition.

The day of the old mud road and the little red school house on the hill is ancient history.

Without aeroplanes, automobiles, gasoline, oil, lumber and the other commodities involved in our modern system of transportation, and essential thereto, no railroad company could exist. Henry Ford and the General Motors Corporation have paid millions and billions of dollars to the railroad companies of this country in freight on automobiles, including equipment and materials therefor.

Without automobiles in appellant's territory its railroad track would soon be dismantled in order that its rails

might be used elsewhere or sold for junk; but yet they are unwilling to pay their proportionate taxes for improved roads without which we would have no possible system of modern transportation such as is enjoyed by the other forty-seven states of this country.

The Court, from the testimony of appellant's witnesses Rice, Forline, White and Davis, will readily discover the railroad theory of improved roads.

In short, appellant and its witnesses are thoroughly in favor of good roads, automobiles, modern transportation, shipments of cars, parts, equipment, oil and gasoline, but they demand that all improved roads shall be constructed at right angles to the railroad's line of track.

They are in favor of right-angle roads, but they are opposed to parallel roads.

This may be a proper attitude, but we doubt it.

For instance, Corinth, Mississippi, is located about thirty miles west of this Oldham Road District.

That city has three great railroad lines.

The Illinois Central runs from Jacksonville, Florida, to Chicago and to St. Louis.

The Mobile & Ohio Railroad runs from Mobile, Alabama, to St. Louis, Missouri.

The Southern Railway, including appellant's section or segment of its route, runs from New York to Memphis, Tennessee.

These roads go through Corinth in three different directions:

First. From northwest to southeast.
Second. From north to south.
Third. From east to west.

The difficulty about this railroad theory for an improved system of rock roads or concrete roads is therefore evident.

It is a reductio ad absurdum.

Those right-angle roads to appellant's track would be parallel to the Mobile & Ohio track and would be approximately parallel to the Illinois Central track.

The vital necessity and universal demand for good roads is well stated by the Supreme Court of Texas in **Aransas County v. Coleman-Fulton Pasture Company**, 108 Tex. 216, 191 S. W. 553:

> "Upon the general subject of road improvement it marked a radical departure from the previous policy of the state. It was the response to a public demand that provision be made whereby the state, and every section of the state, might be supplied through voluntary taxation with adequate, durable and permanent roadways.
>
> "In a word, the purpose of this amendment plainly was to provide the means of building and maintaining not alone neighborhood, precinct or even county roads, but adequate road systems throughout the entire state, to be availed of by larger or smaller areas, as might be desired, so as to afford, through the exercise of a

liberal taxing power widely distributed, adequate and continuous highways through every section of the state. Such a purpose stands out boldly, we think, in the broad and sweeping provisions of the amendment."

Railroad revenue is derived from two sources:

(1) Old business.

(2) New business.

Any railroad that depends on either **old business** or **new business** only for its maintenance and development will soon die of dry rot or gangrene.

Old business must be conserved, encouraged and protected.

New business must be invited by an attitude of equitable co-operation.

The Oldham Road District as a source of railroad revenue is a wonderful territory. Probably no other rural territory in our state will bear comparison with it; equal, perhaps, to an oil field or to the mining districts of Alabama or Tennessee.

The successful operation of the great gravel pits of Tishomingo County, in the future, as in the past, is a competitive proposition.

It takes labor to mine gravel, just like coal or iron. Labor must live, just like railroad officers. This means homes, schools, churches, roads and the other concomitants of organized society. No community without these conditions and advantages can enjoy any reasonable degree of prosperity, that homogeneous prosperity, which means

substantial development of industry and resources. Without improved roads in the Oldham Road District, sooner or later it would mean no schools, no churches, no homes, no families, no labor, no gravel pits, no freight, no revenue to the Railway Company that now enriches itself from the people and the assets of that territory.

The history and evolution of transportation in this country is an epic.

From the Indian trail and the bark canoe, we have come through various stages to the electrified railroad and the ocean liner, to the Panama Limited, to the Seminole, to the Memphis Special over appellant's lines, to the American.

We have come to the concrete road, the truck, the limousine. These modern developments are an answer to the problem of safe and quick transportation. Railroad protest and resistance to the Ford, the Lincoln, the Cadillac, or the G. M. C. truck will do no more good than the river's old antagonism to the railroad. The present system of transportation is a concomitant of modern civilization.

Highways must be paid for. That takes money, and money is derived from taxation.

The sooner railroads recognize that compositions on "special benefits" and "competitive transportation," injunctions and litigation do not constitute an answer to the issues of today and tomorrow, the better.

Browning v. Hooper, 269 U. S. 396, 70 L. Ed. 330.

This now celebrated case, from the State of Texas, was decided by this Court on the 4th day of January, 1926. The decision, eminently right on the facts of the case, was, however, at first misunderstood, and, therefore, being misunderstood, created some uneasiness in certain of the states which had enacted statutes for the organization of road districts and whose road system had been built up through the medium or agency of such districts.

The Legislature of Mississippi convened in regular session two days later, namely, on January 6, 1926, and immediately took suitable measures to forestall any conclusion that its system of roads had been built by road districts such as had been organized in Texas and such as had been condemned in Browning v. Hooper.

But this attitude did not constitute any recognition whatever by Mississippi that Chapter 277, Laws of 1920, came within the condemnation of this Court in Browning v. Hooper, but was merely in pursuance of a commendable public policy for the preservation of the integrity of the state and of every organization or taxing district of the state against any possibility that might result from any misunderstanding of the Texas case.

Chapter 278, Laws of 1926, became effective on the 15th day of March, 1926, a general statute intended to validate as legislative districts all road districts created and organized prior thereto.

Chapter 1080, Laws of 1926, had been previously approved on the 11th day of March, 1926, validating the organization of the Oldham Road District.

Chapter 225, Laws of 1926, was thereafter approved on the 19th day of March, 1926, providing a future method for the organization and operation of road districts in Mississippi.

Other statutes were adopted at the same session of the Legislature providing the system and machinery by which the integrity and honor of the state and its various subdivisions should be saved and guaranteed against repudiation.

We will now undertake an analysis of this Browning-Hooper case on its facts and its law, as contradistinguished from our instant cause, entirely independent of the legislative validation of the Oldham Road District; or, in other words, as that district stood on its facts under the law at the date of its original organization on the 1st day of February, 1926.

In **Browning et al v. Hooper**, 269 U. S. 396, appellants filed suit to restrain the issue of $300,000.00 bonds of Road District No. 2, Archer County, Texas, proposed to be sold to obtain money for specified improvements on designated roads wholly within such district and to restrain the levy or collection of any tax upon the property to pay any part of the interest or principal of the bonds, it being contended that the creation of such a district and the enforcement of

the proposed tax deprived appellants of their property without due process of law, in violation of the Fourteenth Amendment. The District Court dismissed the complaint, and the decree of the District Court was reversed by the United States Supreme Court.

> "Archer County is about thirty miles square, and has a population of between 5,000 and 6,000. The principal place is Archer City, the county seat, located about five miles south and three miles east of the center of the county. Road District No. 2 embraces approximately the northerly half of the county, including a part of Archer City. The Ozark Trail is a federal-aided state highway, and about twenty miles of it extends diagonally across the northwesterly part. Dundee is located on it about two miles from the west line of the county. There is a highway extending from that place to Diversion Dam, about six miles northwest. About eighteen miles of the Southwest Trail lies between Archer City and a point on the north line of the county, about six miles from its northeast corner. There is another highway extending from a point on the Southwest Trail about two miles south of the county line to Holliday, on the Ozark Trail, about six miles west. These roads are within the road district, and the bonds issued are to raise money to improve them."

Seventy-four persons presented the Commissioners Court a petition for an election on the proposed bond issue. The Commissioners Court, pursuant to said petition, established

the district and called the election, which resulted in 303 votes for and 102 votes against the bond issue.

Before the election was called the Court determined that the proceeds of the bonds, if voted, or so much as might be necessary, should be expended for the roads above described.

> "The appellants' lands—24,900 acres in all—are in the northeasterly part of the county. All but one of the petitioners are residents of the part of Archer City that is within the road district. Archer City, Dundee and Holliday furnished 252 votes for the bond issue—more than twice the number cast against it. Nearly all the votes cast in the northeasterly part of the county were negative. The taxable property in the district is assessed at $5,683,359.00, of which $257,080.00 belongs to appellants and $111,388.00 to petitioners, and $60,500.00 of that amount belongs to one signer, leaving only $50,888.00 to the other seventy-three. The part of the district in which appellants' lands are situated is tributary to Wichita Falls, which is outside Archer County, but near its northeast corner."

The case of **Browning v. Hooper** is distinguished from the instant case both on the facts and on the law, as follows:

First. In the instant case the Chancellor, in his opinion, held that the road in question has a tendency and will tend directly to slightly increase the revenues of appellant in that it has opened up a small territory which has furnished and will probably continue to furnish a small amount of pulp wood and timber for shipment over the line of appel-

lant; that indirectly the road will be of considerable benefit to appellant in that it will have a tendency to settle labor conditions and aid in the operation of two gravel pits within the district which actually furnish a large amount of tonnage for appellant.

> "This is a fair statement of the facts in so far as it touches the question of whether or not the appellant will be benefited directly or indirectly by securing increased traffic because of the location of this road."

Such adjudication on the facts was approved by the Supreme Court of Mississippi.

In the case of **Browning v. Hooper**, the Supreme Court of the United States held that "the improvement of the roads designated will not benefit the property of appellants."

Second. The inclusion of appellant's land in one road district in the instant case does not, under the statutes and decisions in the State of Mississippi, prohibit the creation of a new road district to include appellant's property.

The Oldham Road District is a legislative district by the specific statutes of 1926, which is a conclusive answer to appellant's contention that the bond issue of $6,500.00 exceeds the limits permitted under Section 3, Chapter 277, Laws of Mississippi 1920.

However, entirely independent of such legislative validation, we will, without difficulty, be able to demonstrate the

fallacy of such position by the terms of the very statute invoked by appellant and also by Chapter 207, Laws of Mississippi 1920.

Section 3, Chapter 277, Laws of Mississippi of 1920, in part, reads as follows:

> "Then it shall be the duty of the Board of Supervisors to issue the bonds of such supervisors' district, or districts, in any amount not to exceed fifteen per centum, provided in no county or district shall bonds in excess of 15 per cent of the assessed valuation ever be issued of the assessed value of all the taxable property of such district, or districts." * * *
>
> "That any county or supervisors' district or part of supervisors' district or districts which have heretofore issued bonds in said county, supervisors' district or parts of supervisors' district or districts to an amount of ten per cent of the assessed valuation of said county, supervisors' district or parts of supervisors' district or districts, may, under the provisions of this act and in pursuance thereof, issue bonds in addition to those already issued if bonds have heretofore been issued to an amount of ten per cent of the said assessed valuation to an amount not in excess of five per cent of the assessed valuation of said county, supervisors' district or parts of supervisors' district or districts."

This chapter amends Chapter 176 of the Laws of Mississippi of 1914, which, under section 3, fixes a limit of ten per cent of the assessed value on the amount of bonds issued by such districts, the latter quotation under Sec-

tion 3 of Chapter 277 of the Laws of Mississippi of 1920, in view of **Love v. Board of Supervisors,** 111 Miss. 802, 72 So. 230, followed by **Payne v. Board of Supervisors,** 141 Miss. 167, 106 So. 625, which former decision, not having been modified by the Legislature, is adopted as a construction of Chapter 277 of the Laws of Mississippi of 1920, was merely added to permit road districts created under Chapter 176 of the Laws of Mississippi of 1914 to increase their bonded indebtedness from ten per cent to fifteen per cent and not to fix the limit of fifteen per cent on the aggregate bond issues of all taxing districts, included either in whole or in part within road districts authorized to be created under Chapter 277 of the Laws of Mississippi of 1920.

The construction is further supported by Chapter 207 of the Laws of Mississippi, approved March 27th, 1920, one day after Chapter 277 of the Laws of Mississippi, which was approved March 26th, 1920. Chapter 207 fixes a limit of 15 per cent of the assessed value of the taxable property of such county or consolidated or rural separate school district or separate road district.

This construction is further supported by **Wright v. Board of Supervisors,** 124 Miss. 4, 86 So. 643, in which case Chapter 277 of the Laws of Mississippi of 1920 was before the Court.

In **Browning v. Hooper,** "the inclusion of appellant's lands in the road district makes it impossible until the last

bonds mature thirty years hence to create another road district to raise money for the improvement of roads needed to serve the territory in which appellant's lands are situated (Complete Tex. St. 1920, or Vernon's Ann. Civ. St. Supp. 1922, Article 637 D)."

Third. In the instant case the principal and interest of the bond issue will be paid by **an ad valorem tax** placed on **all** property in the district.

The expenditure of moneys raised by the bond issue in the instant case is not limited to any **specified** roads, the roads to be improved being **designated by highway commissioners** after the election resulting in favor of the issuance of such bonds as provided by section 5 of said chapter 277. The purpose in creating the district in the instant case cannot be said to be special. The district will not cease to exist as a body corporate upon the payment of the bond debt. The district has authority, under Chapter 207 of the Laws of Mississippi, approved March 27th, 1920, one day after the approval of Chapter 277, said Laws of Mississippi, to issue additional bonds within the limitations fixed in said chapter 207; and will continue to exist as a body corporate long after the payment of the bonds involved in this litigation.

In **Browning v. Hooper**, on the other hand, the expenditure of the bond issue is limited to roads **designated in the initial petition.** The purpose was **special** and the district will cease to exist as a body corporate upon the payment of the bond debt.

As stated by the Supreme Court, "it is clear that the burdens sought to be imposed on appellants' lands are **special assessments** for local improvements."

Fourth. In the instant case, under Section 170 of the Constitution of the State of Mississippi, "the Board of Supervisors shall have full jurisdiction over roads, ferries and bridges to be exercised in accordance with such regulations as the Legislature may prescribe." Upon the filing of the petition for the creation of the Oldham Road District, the Board of Supervisors had discretionary power to refuse to create that district, if in their sound judgment that district should not be created, and no act of the Mississippi Legislature could deprive them of this constitutional right and duty to exercise such discretionary power.

Further, under Section 5 of Chapter 277 of the Laws of Mississippi of 1920, after the election in favor of the issuance of said bonds, it became the duty of the Board of Supervisors to appoint three commissioners for such district, said commissioners, subject to the approval of the Board of Supervisors, to determine and fix what road or roads shall be constructed or constructed and maintained or maintained in the Oldham Road District out of the proceeds of the sale of said bonds.

In **Browning v. Hooper**, the commissioners' duties in respect of the amount to be raised and the lands to be subjected to the charge were purely ministerial and confined solely to carrying out the will of the petitioners when approved at the election, the particular roads to be improved

having been designated in the original petition for such improvements and there being no constitutional provision in the State of Texas conferring upon such commissioners full jurisdiction over roads, ferries and bridges. The Supreme Court of the United States stated: "The Commissioners' Court has no power to modify or deny; it is bound to grant the petition."

Fifth. In the instant case the Legislature has delegated to the Board of Supervisors of Tishomingo County the discretionary power upon the filing of a proper petition to create the Oldham Road District, such district, when created, being a municipality to which the state has granted full legislative powers, subject to the approval of the Board of Supervisors as provided by said chapter 277. It has been repeatedly held, as stated in **Browning v. Hooper**, that the owners of property in such a district have no constitutional right to be heard on the question of benefits in such a case (**Hancock v. Muskogee**, 250 U. S. 454; **Valley Farms Company v. Westchester County**, 261 U. S. 155; **St. Louis & Southwestern Railway Company v. E. H. Nattin, Tax Collector**, 277 U. S. 157.

In **Browning v. Hooper**, on the other hand, the road district was not created by the Legislature. There was no legislative delegation of authority. The amount of the bonds to be issued and the property to be taxed are the elements which determine the burden.

These were fixed by the petition and the election. There was **no discretion** in the Commissioners' Court to issue such bonds or determine the property to be taxed.

Sixth. In the instant case, there is a right of appeal to the Circuit Court and from the Circuit Court to the Supreme Court from every action of the Board of Supervisors of Tishomingo County.

In the Browning case there was no such right of appeal.

Furthermore, the Supreme Court of Mississippi in the instant case, as per our citation, supra, draws an exceedingly clear distinction between the principles involved in Browning v. Hooper, supra, under the Texas statutes and our instant case under the Mississippi statutes.

The Supreme Court of Mississippi says (Rec., p. 234):

> "Appellant contends that Chapter 277 of the Laws of 1920 is violative of both the due-process and the equal-protection clauses of the Fourteenth Amendment to the Federal Constitution. In considering these questions, it should be borne in mind that the road district involved is an ad valorem taxing district, and not a special benefit assessment district. The property of the district, both real and personal, is taxed for state and county purposes in proportion to its assessed value upon an ad valorem basis, and is likewise taxed under the act for road purposes. The act makes no distinction between real and personal property.
>
> "The main case relied upon by appellant to sustain its position that the statute denies to the prop-

erty owners of the district due process is Browning v. Hooper, 269 U. S. 396, 46 S. Ct. 141, 70 L. Ed. 330. In that case it was held that, where a local road district was created by petition of a certain per cent of the taxpayers of the territory composing the district, and there was no legislative determination that the property in the district would be benefited by the proposed local improvement, notice to the property owners of the district, and an opportunity to be heard, was essential to due process. The Texas statute, held to violate due process in that case, did not itself create the district, levy the taxes, or fix the amount to be raised for road purposes. There was nothing in the statute to guide or limit the action of the signers of the petition in selecting the property to be assessed and taxed. Subject to a vote of the district, the territory to be taxed was absolutely fixed by the petitioners. The County Court had no power to deny the petition. It was bound under the statute to organize into a taxing district the territory as described in the petition. The Court said, among other things: 'But it is essential to due process of law that such owners be given notice and opportunity to be heard on that question where, as here, the district was not created by the Legislature, and there has been no legislative determination that their property will be benefited by the local improvement. Appellants were denied all opportunity to be heard. No officer or tribunal was empowered by the law of the state to hear them or to consider and determine whether the road improvements in question would benefit their lands. The act is repugnant to the due-process clause of the Fourteenth Amendment.'

"The Court further stated, however, that where a local improvement territory is selected and the burden is spread by the Legislature, or by some local administrative board to which the state has granted legislative powers on the subject, the property owners had no constitutional right to be heard, and, therefore, there was no denial of due process. St. L. & S. W. Ry. Co. v. Nattin, 277 U. S. 157, 48 S. Ct. 438, 72 L. Ed. 830, involved the constitutionality of a road statute of Louisiana. Under the laws of that state the police juries of the parishes are the governing bodies of the respective parishes. The statute empowered the police juries to create road districts from such portions of their parishes as they might determine, and, with the approval of the voters of the district, to issue the bonds of the district, and construct roads from the proceeds thereof. The constitutionality of the statute was challenged upon the ground that it failed to provide the taxpayers of the district with an opportunity to be heard. The Court said that the sufficiently short answer to the contention was that under the repeated decisions of the Supreme Court that was not essential; that the tax sought to be enjoined in that case was a general ad valorem tax, and that its legality did not depend upon the receipt of any special benefit by the taxpayers; that other statutes of the state provided ample opportunities for the taxpayers to contest the value of their property for the purpose of taxation; that a local legislative body, as was the police jury, when properly authorized, could levy a general ad valorem tax upon all property within its jurisdiction, including common carriers engaged in interstate commerce, without violating the Federal Con-

stitution (citing Valley Farms Co. v. Westchester, 261 U. S. 155, 43 S. Ct. 261, 67 L. Ed. 585; Hancock v. Muskogee, 250 U. S. 454, 39 S. Ct. 528, 63 L. Ed. 1081).

"Now, applying these decisions of the Supreme Court to the act here involved: If the act confers upon the Board of Supervisors the legislative discretion of determining whether or not the territory described in the petition shall be organized into a road district, notice and an opportunity to be heard on the part of the taxpayers is not required. Putting it differently, if, in the organization of a road district under the statute, the Board of Supervisors acts in a legislative capacity, and not in a judicial capacity, and has the legislative discretion to organize, or refuse to organize, the district petitioned for, as they may deem to the best interest of those concerned, then an opportunity to be heard on the part of the taxpayers is not required. Can the act reasonably be so construed?

"The provisions of section 2 of the act, which is copied in the opinion handed down in this case, furnish the principal grounds of attack on the constitutionality of the act. Appellant contends that this section of the act made it mandatory on the board of supervisors to organize the road district petitioned for, and that the board had no legislative or other discretion in the matter. We think this question has been, to a large extent, determined against appellant's contention. Chapter 277, Laws of 1920, is amendatory of Chapter 176, Laws of 1914; Chapter 145, Laws of 1912, and Chapter 149, Laws of 1910. So far as they affect the questions here involved, sections 1, 2, and 3 of the act (Sections 8429 to 8431, inclusive, of Hemingway's Code of 1927), have been substantially the same in all four acts. In Robinson v. Itawamba

County, 105 Miss. 90, 62 So. 3, a road district was organized under Chapter 149 of the Laws of 1910. The board of supervisors, thereafter, passed a resolution providing for the issuance and sale of the bonds of the district for the purpose of constructing improved highways. No further steps were taken by the board. On demand of interested parties, the board refused to proceed with the issuance and sale of bonds. Mandamus was sued out to force the board to proceed with the issuance and sale of bonds and construction of the roads. The Court held that the board of supervisors could not be forced to issue and sell bonds for two reasons, namely, because the board had the right, under the statute, to exercise its discretion as to whether or not it would do so, and that the law furnished an adequate remedy by appeal to the Circuit Court from the action of the board in refusing to issue bonds. The language of section 2 of the statute, in reference to the organization of road districts, is not any more imperative than the language of section 3, with reference to the duty of the board, to issue bonds of the district after the district has been organized. Bryant v. Yalobusha County, 133 Miss. 714, 98 So. 148, does not hold to the contrary. The road district involved in that case was organized under the statute here under consideration. It was held that, if the board of supervisors organized a road district under the act, it had to be the district petitioned for—that the board had no authority under the act to organize either a larger or a smaller district. The question whether, under the act, the board was vested with the discretion whether or not it would organize any road district whatever, was not involved nor decided in that case. In Prather v.

Googe, 108 Miss. 670, 67 So. 156, Chapter 176 of the Laws of 1914, of which the act involved is amendatory, was challenged as unconstitutional on at least two grounds, one of which was that it violated section 170 of the Constitution, in that it encroached on the jurisdiction of the board of supervisors over public highways. It is true, the identical question here involved was not decided in that case, but the Court said, in broad language, that the act did not take away from the board of supervisors its discretionary powers over public roads. Construing the statute in the light of Section 170 of the Constitution, vesting in the board of supervisors jurisdiction over roads, bridges and ferries, and the above decisions of our court, we are of the opinion that the act vested in the board of supervisors the legislative discretion to organize or refuse to organize, according to their judgment of the best interests of those concerned, the road district petitioned for; that although, under the Yalobusha County case, if a district is organized, it must contain the territory embodied in the petition—no more, no less—still the board is vested with the discretion of deciding whether the benefits to be derived from the proposed district will be justified by the necessary tax burdens. So construing the statute, it comes within the principles laid down by the Supreme Court in the Louisiana case (St. Louis & S. W. Ry. Co. v. Nattin, 277 U. S. 157, 48 S. Ct. 438, 72 L. Ed. 830), and falls without the class of statutes held by the Supreme Court as denying due process, in the Texas case (Browning v. Hooper, 269 U. S. 396, 46 S. Ct. 141, 70 L. Ed. 330)."

Justice Etheridge, in his special concurring opinion, emphasizes the statutory scheme or system in this state, clearly differentiated from the statutory provisions of the State of Texas, under which the decision was rendered in the Archer County case.

It, therefore, follows under the statutes of the State of Mississippi, as construed by its Supreme Court, that the Board of Supervisors in each county, including, of course, Tishomingo County, is a legislative board, vested with discretionary power to create road districts or to deny petitions for such purpose, as their legislative judgment may demand.

The majority opinion directs specific attention to the character of the assessment in the instant case, an ad valorem tax, as against taxation for betterments or special improvements. The Court clearly demonstrates that the practical effect of Chapter 277, Laws of Mississippi of 1920, does not under the Fourteenth Amendment to the Federal Constitution operate or impose any arbitrary and unreasonable discrimination against appellant, distinguishing the instant case against those cases cited by appellant in that court.

> "All property in the district involved in this case, both real and personal, on which an ad valorem tax is levied for general state and county purposes is likewise levied for road purposes of the district. Appellant lays stress on the following facts: The area of the district is 2,950 acres, of which appellant owns only 57.79 acres, which is 1.9 per cent of the whole

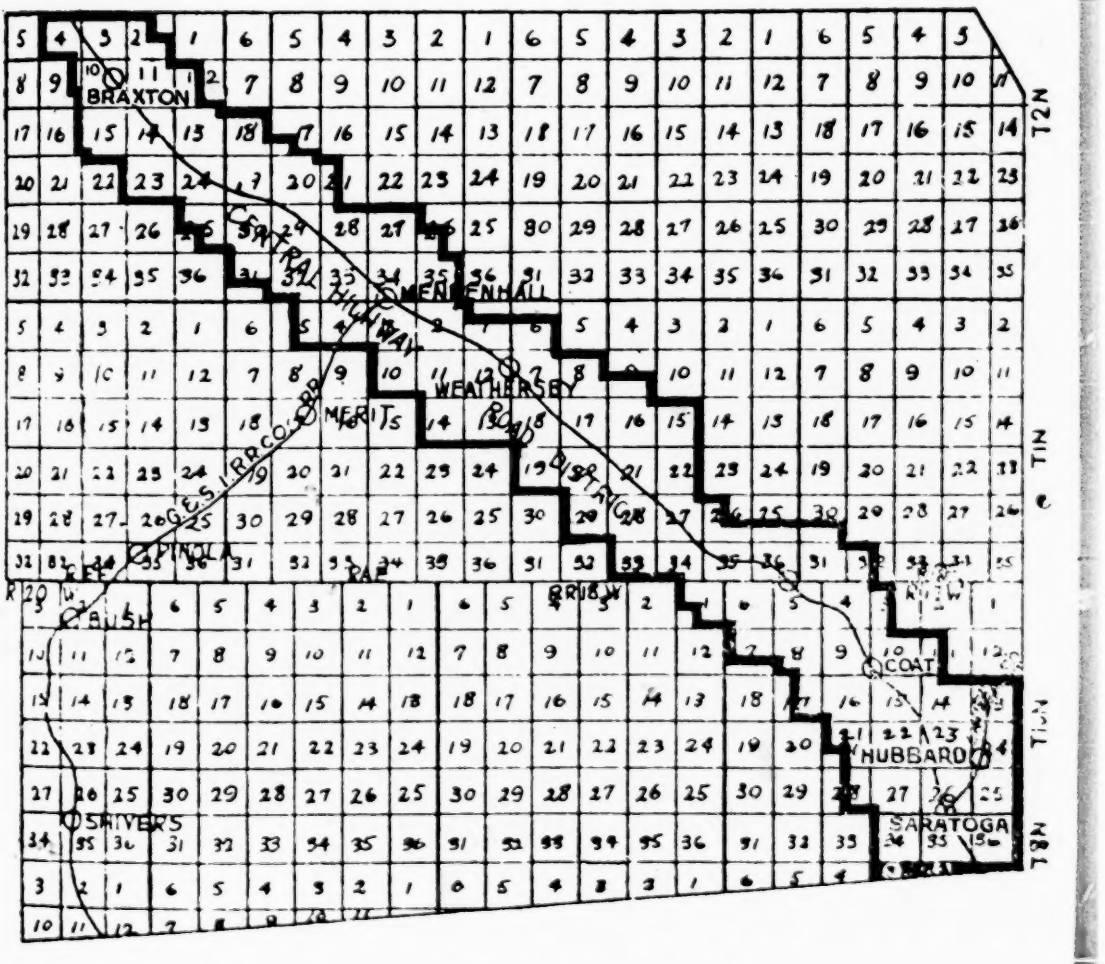
acreage; the assessed valuation of appellant's property in the district is 62.39 per cent of the entire assessed valuation of the district. The evidence showed, however, that the proceeds of the bonds issued for the district had been expended on public roads, and none of the roads constructed ran parallel with the appellant's line of railroad, but nearer at right angles with it; that the road district was composed of a little less than five sections, but that the sections were not strung along, one after the other, so as to take in as much of appellant's line of railroad as could be done; and, furthermore, the evidence tended to show, and the Chancellor found as facts, that the improved roads in the district would benefit appellant's business as a common carrier, both directly and indirectly—that the direct benefit would be derived from an increased tonnage for appellant from the gravel mines in the district, which gravel mines were made more accessible to miners by virtue of the improved roads. In other words, that the improved roads increased the labor facilities in the gravel mines to such an extent that the output of the mines would be materially increased, the output of the mines being transported alone over appellant's lines of railroad. We are unable to see that the operation of the statute has worked any arbitrary and unreasonable discrimination against appellant. We do not think the cases relied on by appellant at all decisive in favor of appellant's contention."

This clear distinction between the statutes of Mississippi and the statutes of Texas condemned in **Browning v. Hooper**, supra, is admirably discussed in what is commonly called the "Duckworth Case," which originated in the Southern District of Mississippi, being reported in

Gulf & Ship Island Railroad Company v. Duckworth, Sheriff and Tax Collector et al., 280 Fed. 733.

The Court will find in this case **so reported** a map or sketch of the Central Highway Road District of Simpson County, State of Mississippi, which was under attack in that cause.

We insert a copy or drawing thereof for consideration and analysis.



Hon. E. R. Holmes, District Judge, rendered an opinion in that case which is a model of clear expression and cogent logic.

The complainant there was undertaking substantially the same attack on the road system of Mississippi as is involved in the instant cause, the only exception being that the Duckworth case was an attack on Chapter 176, Laws of Mississippi 1914, while the instant cause attacks Chapter 277, Laws of Mississippi 1920.

Judge Holmes, in his opinion, cites **Prather v. Googe**, 108 Mississippi 670, 67 So. 156, which decision sustains the constitutionality of Chapter 176, Laws of Mississippi 1914.

Incidentally, it is entirely clear for the purposes of the instant case that the decision in **Prather v. Googe**, supra, also in effect sustains the constitutionality of Chapter 277, Laws of 1920.

If one statute is constitutional, both of them are constitutional.

If one statute is unconstitutional, both of them are unconstitutional.

The Court has held that the law of 1914 is constitutional and it certainly follows, independently of numerous decisions since the Prather case, that the laws of 1920 are also constitutional.

The opinion in the Duckworth case emphasizes the delegated legislative power and discretion to create taxing districts on the basis of ad valorem assessments.

Such decision and opinion also draws the definite dis-

tinction between our system of ad valorem taxation for the organization and operation of road districts in this state as against local assessments or betterment taxes.

> "This is not the case of a local assessment or betterment tax, charging the cost of a local improvement upon individual property in proportion to benefits estimated to accrue thereto, but is the case of the creation by authority of the Legislature of a separate special taxing district, which is made to bear the entire cost of a local improvement, to wit, a public highway traversing the entire length of the same. This cost is distributed equally upon the property in the district upon an ad valorem basis. If this distinction is kept in mind, it will serve to differentiate most of the cases cited by attorneys for complainant, notably **Kansas City Southern Railway Co. v. Road Improvement District No. 6**, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151, which is their main authority."

Appellant, in its brief, bases its position largely on the principles announced in **Kansas City Southern Railway Co. v. Road Improvement District No. 6**, 256 U. S. 658, 65 L. Ed. 1151.

The difficulty with appellant in the instant case is that it entirely fails to draw the distinction so admirably declared by Judge Holmes in his opinion.

This Duckworth case did not go to the Supreme Court of the United States, but was taken on appeal to the Circuit Court of Appeals, Fifth Circuit, where decision was rendered on the 7th day of February, 1923, as reported,

Gulf & Ship Island Railroad Company v. Duckworth, Sheriff and Tax Collector et al., 286 Fed. 645.

The Circuit Court of Appeals, in a cogent opinion, affirms the judgment of the District Court, dismissing complainant's bill attacking the constitutionality of the Mississippi road system.

It is true that in the Duckworth case the property owned by the Railroad Company represented in value only about one-fifth of all taxable property in the Central Highway Road District, but the opinion emphasizes the fair and equal valuation of all property in such district, including railroad property for taxation; and the Court calls attention again to the clear distinction between a system of ad valorem taxation as in this state as against an assessment for local improvements or betterment taxes as in **Kansas City Southern Railway Company v. Road Improvement District No. 6**, supra.

> "The tax was not a local assessment levied upon the theory that the improvement was a special benefit to the abutting property, but was an ad valorem tax levied on all of the property in the district, whether it abutted on said highway or not.
>
> "The case is entirely unlike that of **Kansas City Southern Ry. v. Road Imp. Dist. No. 6**, 256 U. S. 658, 41 Sup. Ct. 604, 65 L. Ed. 1151. In that case a part of the costs of a road was assessed against a railway company according to an arbitrary assessment of benefits to its property on account of its building. The manner of assessment of benefits against the railway company was wholly different from that used

in assessing benefits as to any other property in said district, and made so palpable and arbitrary a discrimination between the railway company and other owners assessed that it was held to amount to a denial of the equal protection of the laws. Here there is no assessment for a local improvement, but a special ad valorem tax levied on all the property in the road district on a valuation as to which no objection of any discrimination or unfairness is alleged."

The Court also sustained, in the Duckworth case (after declining consideration of all questions raised as to any violation of the Fifth Amendment to the Constitution of the United States, citing **Brown v. New Jersey**, 175 U. S. 172, 44 L. Ed. 119), the constitutionality of the Mississippi statute under the Fourteenth Amendment to the Constitution of the United States:

"The laws of the State of Mississippi authorize the Board of County Supervisors to create road districts and authorize the issuance of bonds for the construction of roads therein (Hemingway's Ann. Miss. Code 7158-7161). The laws of said state afford to all taxpayers the right to be heard on an appeal to the Circuit Court in regard to the levy of taxes, and also in **regard to any other decision** of the Board of Supervisors, and the railroad company, as a taxpayer, could have been heard on the proposition to create this district and issue bonds for the building of this highway. Such statutes do not deny to the appellant any rights under the Fourteenth Amendment of the Constitution of the United States (Hemingway's Ann. Miss. Code, 60, 61). Indeed, the bill makes no charge

that it could not have been fully heard before said Board of Supervisors, had it so desired."

Another most interesting case involving several of the contentions submitted for consideration by appellant in the instant case, is **Oregon Short Line Railroad Company v. Clark County Highway District from the District Court of Idaho,** Volume 22 (2nd) Fed. 681.

The Clark County District was validated by the Legislature of the State of Idaho under Chapter Four, Local and Special Laws of Idaho, 1927; and the decision which we cite was rendered by a special district court in equity composed of three judges. That tribunal declared for the validity of the district, announcing the general rule for the creation of legislative districts under **Gast Realty Company v. Schneider Granite Company,** 240 U. S. 55, 60 L. Ed. 523, and other authorities.

The facts of that case are stated in considerable detail, showing that the railroad company owned approximately one-half of all property assessed for taxation in such district.

The Court declined to say, under those circumstances, that the burden of taxation on the railroad company was either arbitrary or discriminatory, although conceding that it would be difficult to trace direct benefits to such railroad company or to measure the indirect value of the road improvement to such company.

As the opinion points out, it is often difficult to trace

and locate exact benefits direct or indirect to given property.

The Court well says in that case, as we have continued to insist throughout in the instant case:

> "As to the benefit to plaintiff, it is not merely a question of the increase of its local business, but maintaining what it has.
>
> "Highways may be quite as important in holding population and industrial enterprises as in getting them; and, if highways are to be built and maintained, how is the burden to be borne, if not in the manner prescribed?"

Appellants are protesting against that system of assessment for taxation which they themselves accept and under which they are operating today in Mississippi.

Witness for appellant, C. N. Freeman, introduces certain exhibits as follows, to wit:

Exhibit A (Rec., p. 117);
Exhibit B (Rec., p. 120);
Exhibit C (Rec., p. 135).

These exhibits in connection with the testimony of this witness, and other witnesses for appellant, conclusively demonstrate acceptance and acquiescence by appellant in the payment of state taxes and county taxes on all property in Tishomingo County, in the first supervisor's district of said county, in the Lee Highway District, and in the Snowdown School District, based on assessments by

the State Tax Commission, a situation which puts appellant in an impossible predicament, in its present protest against the statutory system of taxation by the State of Mississippi.

Furthermore, Tishomingo County as a road district, the first supervisor's district of said county as a road district, and the Lee Highway District as a road district, were all organized under Chapter 277, Laws of 1920, or previous statutes, substantially identical therewith, for the purposes of this cause.

The Mississippi system for the organization and operation of road districts appears for the first time in Chapter 149, Laws of Mississippi of 1910.

Such original statutory system was amended thereafter by Chapter 176, Laws of Mississippi of 1914.

The first bond issue in Tishomingo County was by the first supervisor's district thereof for $35,000.00 on the 15th day of December, 1911 (Rec., p. 117).

Such bond issue was under the Laws of 1910.

Counsel for appellant, in their brief, inform the Court that the Memphis & Charleston Railway Company pays 62 per cent of the entire tax in the Oldham Road District, but that the Allen Stone and Gravel Company and the Memphis Stone and Gravel Company, "obviously the most largely benefited taxpayers in the district," pay only 8 per cent each of the tax (Rec., p. 100).

The difficulty about this proposition is that counsel did not testify as witnesses in the case. No testimony

either shows or tends to indicate that said corporations are the chief beneficiaries of the improved system of roads in the Oldham District.

The record of course shows that both of those gravel pits do an enormous volume of business; but every ton of their product goes out over appellant's line of railroad, without competition.

No witness in the case testifies that either the Allen Company or the Memphis Company has escaped taxation on any of its assets, real or personal.

Mr. D. F. Rice, division superintendent of the Mobile & Ohio Railroad Company, an affiliated corporation with appellant, testifies that the local passenger traffic of the Memphis & Charleston Railway Company, and other railroads for that matter, has been reduced by "hard-surface roads running parallel with the railroad."

Certainly.

However, it is equally certain that the vast volume of business accruing to the railroad companies from the transportation of automobiles, automobile parts, oil, gasoline, and other commodities of these modern activities, is a source of revenue absolutely without precedent in railroad history.

The official records of the Interstate Commerce Commission will conclusively demonstrate that, notwithstanding reduced local passenger traffic, the railroad companies of this country enjoyed, during the year 1929, the most wonderful prosperity within the past decade.

Mr. W. H. Foreline, train master for the same Mobile & Ohio Railroad Company, also testified to reduced local passenger traffic as the result of hard-surface roads; but this witness was compelled to admit that railroad prosperity inevitably follows the development of railroad territory.

The great railroad companies of this country today are maintaining their agricultural departments, their industrial departments, and perhaps other departments, for the improvement and development of both urban territory and rural territory; but when they are asked to contribute, under a just and equitable system of taxation, to a system of improved roads absolutely essential to their own prosperity, they often resist.

There is only one popular form of taxation in this country, and that is the system which makes the tax fall on someone else.

This witness also, with specific reference to the two gravel pits of the Oldham Road District, was compelled to admit that appellant would be deprived of its large revenue, approximately $250,000.00 per annum gross, if labor conditions in that territory were such as to prevent operation of the pits.

Mr. Foreline admirably illustrates the railroad position; and we quote him:

> "Q. And these automobiles from Henry Ford and Buick and other concerns, they are shipped in here

by rail from the various factories, from Detroit, Chicago, Ohio and elsewhere?

A. Some are, and some shipped into distributing points and delivered out.

Q. But 99 or 100 per cent of that business comes in from the factories by railroad?

A. I would say so; yes, sir.

Q. We have no great oil refineries or gas plants in Mississippi?

A. No, sir; not yet.

Q. Possibly, from your suggestion, you might own a little stock in the Amory Petroleum Company, together with myself and the Court?

A. I would answer that the same way—not yet.

Q. Well, from the refineries and the gasoline plants, this oil, gas, grease and other commodities going into the operation of this enormous automobile traffic of our country, for business and for pleasure, that is railroad business, ordinarily comes in by train?

A. As a general proposition, we move it in bulk.

Q. As a railroad man, you have given in your judgment for the complainant. Do you believe the hard-surface roads and development of the country, including this automobile proposition, including gaso- [fol. 140] line and oil, grease and parts of automobiles, you think that development of the country under those circumstances is increasing or decreasing railroad business and population?

A. Increasing it.

Q. If it was in your power as representatives of the railroad company, to eliminate this development of the country, hard-surface roads, including automobile competition, also taking into consideration the automobile business, oil, gasoline, etc., that goes to the

railroad company, and also taking into further consideration the advantage of lateral roads that bring in cotton and other commodities to the railroad, would you believe that would be good business or bad business?

A. I don't think the development should be eliminated; I think the competition should be eliminated; I don't think the development of the country should be hindered any way.

Q. You think we should have all these developments and hard-surface roads, but no transportation should be over these hard roads in competition with the railroad companies?

A. In a measure, that is what I mean; yes, sir.

Q. In other words, you mean the national and state highways simply should be for pleasure cars and not for traffic?

A. In competition, I should say not.

Q. In other words, it is all right to use a Lincoln sedan on a national or state highway, but not right to use a truck in competition with railroads to haul commodities for consumption?

A. I don't think it is right.

Q. In other words, just to be perfectly clear, the Lincoln sedan would be all right but the truck would not be right?

[fol. 141] A. The Lincoln sedan used as a pleasure car would be all right.

Q. But the truck-hauling car wouldn't be all right?

A. The truck and busses wear out the roads, which we have labored for and paid for, and all wrong" (Rec., pp. 103-4).

A Lincoln sedan is all right, but a Ford truck is all wrong, according to appellant's contention through its witnesses in this case, or in other words, under this record, appellant and its affiliated corporations are in favor of a national and state system of highways, but demand the right to exclude therefrom all motor vehicles for business purposes, including the transportation of commodities which could otherwise be shipped as railroad freight.

Appellant introduced as a witness Joe White, freight agent at Corinth, Mississippi, some thirty or forty miles west of the Oldham Road District, in order that he might tell what he knew about the issues involved in this suit; but appellant was exceedingly careful not to introduce its agent at Iuka, Mississippi, through which office all shipments were made out of the Oldham District, including its gravel pits.

Mr. White had a full statement of freight business from Corinth, Mississippi, to other points east of there, including Iuka, Mississippi, on a comparative basis as between 1923 and 1927; but appellant was exceedingly careful to avoid in this record by any possible peradventure any similar exhibit or statement of its business from Iuka, Misissippi, originating in the Oldham Road District.

With reference to the vital issues in this case, appellant introduced five witnesses, and five witnesses only, as follows, to wit:

E. S. Davis (Rec., p. 68).
T. C. Blackwell (Rec., p. 84).
D. F. Rice (Rec., p. 93).
W. H. Foreline (Rec., p. 99).
Joe White (Rec., p. 105).

None of these witnesses had any personal knowledge of conditions in the Oldham Road District either before or after the organization thereof. None of them introduced any exhibits or records comparative or otherwise showing the results accruing to appellant in its revenues at Iuka, Mississippi, shipping point for said district, or rather its billing point.

Appellant in its brief undertakes to demonstrate as a matter of mathematics that discrimination in taxation results from the statutory system in the State of Mississippi by which the local authorities of a county assess its real estate and personal property, while the State Tax Commission assesses all public service corporations.

Appellant says:

> "The very fact that in this case the assessments were made by entirely different assessing authorities conclusively, we submit, shows in and of itself discrimination, in view of the legislative adoption of such bases."

What does all of this phraseology mean?

It means just simply this, viz., that appellant condemns all taxation in Mississippi and in every other state where

public service corporations, including railroad companies, are subject to assessment by a commission or board representing the state.

Under any other system, the Board of Supervisors of every county in the state would be required to assess such public service corporation, including railroad companies, on their assets, mileage or trackage in every county, respectively.

One county could assess the trackage within its territory at $10,000.00 per mile, and the adjoining county could assess it $20,000.00 per mile, or $40,000.00 per mile, or some other amount.

Reason and common sense condemn any theory such as appellant suggests in its brief.

Furthermore, appellant has itself accepted and acquiesced in the statutory system of taxation in the State of Mississippi, paying taxes thereunder, both state and county taxes in Tishomingo County, road taxes in the Lee Highway District and school taxes in the Snowdown School District.

Appellant has therefore accepted and acquiesced in the validity and constitutionality of the statutes of Mississippi until the organization of the Oldham Road District on the 4th day of February, 1926, and, in fact, until its bill was filed herein on the 13th day of May, 1927.

Appellant therefore protests on this appeal to the Supreme Court of the United States against the statutory method for the assessment and taxation of public serv-

ice corporations by the State of Mississippi, and also against the constitutionality of the road system of said state under its statutes, although it had accepted and acquiesced in all of such statutes under this record for at least sixteen years before this instant litigation.

Appellant could have attacked the constitutionality of the road system and statutes of Mississippi under the bond issue of Tishomingo County for $300,000.00 or under other districts in Tishomingo County, Alcorn County or other counties across the State of Mississippi, from Alabama to the Tennessee line, districts involving large bond issues, but for reasons of its own appellant selected for its attack on the constitutionality of the road system of Mississippi this small district in Tishomingo County involving a bond issue for the modest sum of $6,500.00 only.

Appellant's motive in the selection of this small district for such attack is more or less obscure, perhaps a purpose to secure adjudication on a comparatively small district involving a small bond issue where active opposition might possibly be avoided.

In any event, appellant, while selecting a small district, selected a district of vital importance to the Southern Railway System, including the Memphis & Charleston Railway Company.

Taxation, for instance, in the Oldham Road District under the bond issue involved in this litigation would amount to the approximate sum of $1,800.00 against appellant in four years time, while the gross railroad revenues of such

district for the same period of time would be approximately $1,000,000.00.

The logic of this situation on its facts is so evident that we submit our cause to the Court's consideration with all confidence.

By every principle of equity and right appellant, under the facts and under the law of this case, should be required to pay its proportionate taxes for the road system of the Oldham District.

ANALYSIS OF AUTHORITIES CITED BY APPELLANT.

In the alphabetical order in which its authorities appear in the index to appellant's brief, we briefly consider these cases, as follows:

Atchison, T. & S. F. Ry. Co. v. Anderson County, 120 Kan. 240, 243 Pac. 282.

The holding in this case is that the correct method of taxation in a special benefit district is according to benefits, and that no other method (for example, the ad valorem method) should be adopted. The converse of this principle is equally sound, that in an ad valorem district the method of taxation should be ad valorem, and not, as contended by appellant, according to benefits to lands only.

Branson v. Bush, 251 U. S. 182.

In this case a special benefit road district had been created under a special act of the Arkansas Legislature, which not only created the district, but prescribed its boundaries. Aside from the main fact that this was a special benefit district and not an ad valorem district, there are two things in the opinion, which, as applied to the present case, are significant. At page 188 the Court said that the Fourteenth Amendment "was not intended to compel the state to adopt an iron rule of equal taxation." And at page 191, this, namely, that "To this must be added the obvious fact that anything that develops the territory which a railroad serves

must necessarily be of benefit to it, and that no agency for such development equals that of good roads." And this Court, by its judgment, reversed the Circuit Court of Appeals, which had itself reversed the decree of the District Court sustaining the tax on real estate.

Browning v. Hooper, 269 U. S. 396.

This case is discussed at length in the body of our brief.

Chicago, R. I. & P. Ry., In re, 28 Fed. (2d) 56.

This is a decision of the District Judge of the First Division of the United States District Court of Kansas. The local improvement district involved was a drainage district organized under a statute which provided, among other things, "that all * * * taxes * * * shall be levied * * * in proportion to the benefits derived * * *." It also provided for the appointment of a benefits and damages commission, whose duty it was "to assess the cost of improvements made against the land and other real property in proportion to the benefits derived therefrom." The Commission, however, assessed benefits, not according to this method, but according to assessed values. No such parallel exists in the case at bar.

Embree v. Kansas City Road District, 240 U. S. 242.

This case arose as to a special benefit road district, and not an ad valorem district. The Supreme Court of Missouri, under whose statutes the district had been organized, had construed that statute, and this Court followed the

Supreme Court of that state in so far as the former had spoken. But we do not see the applicability of that case in the present connection, because, first, the district was based entirely on special benefits, and not upon ad valorem taxation; and, secondly, nothing arbitrary was shown, nor was there any abuse of power. And this Court, speaking through Mr. Justice Van Devanter, said:

> "A legislative act of this nature can be successfully called in question only when it is so devoid of any reasonable basis as to be essentially arbitrary and an abuse of power" (citing cases) (pp. 250-251).

French v. Barber Asphalt Paving Company, 181 U. S. 324.

In this case a judgment of the Supreme Court of Missouri was affirmed in a suit instituted by a paving company on a special tax bill issued for the paving of a street in Kansas City. The district was distinctly a local benefit assessment district to pay the cost of street paving, and was in no sense similar to an ad valorem road district such as the Oldham District of Tishomingo County, Mississippi. No further comment would seem to be necessary. One significant thing in this case, however, is that it was held by this Court, in substance, that it was not the intention of the Fourteenth Amendment to subvert the systems of the state pertaining to general and special taxation.

Gast Realty & Investment Co. v. Schneider Granite Co., 240 U. S. 55.

This also was a suit to collect a tax for paving a street in St. Louis, under a city charter which provided that one-fourth of the total cost should be levied upon all the property fronting upon or adjoining the improvement according to frontage, and three-fourths, according to area, upon all the property in the district, ascertained according to rules specifically set out. It will be observed that this was in no sense an ad valorem district, but purely and simply a special benefit assessment district. The evidence established that there were gross inequalities and differences in the assessments laid upon different properties, because the city ordinance, following the mechanical charter rule, established a line determining the proportion in which the tax was to be borne that, after running less than one hundred feet from the street, leaped to nearly five hundred feet, and on the opposite side of the street was one hundred and fifty and two hundred and forty feet away. These differences were not based upon any consideration of differences in the benefits conferred. The case was not merely an incidental result of a rule which on the average works well, but, in the language of Mr. Justice Holmes, "of an ordinance that is a farrago of irrational irregularities throughout." We respectfully submit that no such condition exists in the case now at bar. The Oldham Road District of Tishomingo County, Mississippi, is an ad valorem district. If its taxes are subject to the

criticism so justly leveled against the street paving system of St. Louis, then the whole of the ad valorem tax system of the State of Mississippi is being assailed in this case.

Hesse-Rix Co. v. Krug, 319 Mo. 880, 6 S. W. (2d) 570.

This was an action on special tax bills for street paving in the City of St. Joseph, Missouri. And here again the district was one based upon special benefits only, and not upon ad valorem taxation. But the city engineer laying out the district had followed a blind mechanical rule which he conceived to be directed by the state statute, without regard to, or any consideration of, the special benefits accruing to each of the several tracts of land by reason of the paving improvements (p. 887).

We respectfully submit that none of these special tax bill cases are in point.

Houck v. Little River Drainage District, 239 U. S. 254.

This case originated under a Missouri statute providing for the organization of drainage districts, and was a suit to restrain the collection of a fixed tax of 25 cents per acre levied upon all lands in the district to pay preliminary expenses. The district was, of course, a special benefit assessment district, and not an ad valorem district. The question presented on the record was in no sense similar to any of the questions now before the Court, but some of the language used in the opinion of Mr. Justice Hughes may be helpful. For example, at page 262, we find this language:

"In view of the nature of this enterprise, it is observed that, so far as the Federal Constitution is concerned, the state might have defrayed the entire expense out of state funds raised by general taxation, or it could have apportioned the burden among the counties in which the lands were situated and the improvements were to be made (The County of Mobile v. Kimball, 102 U. S. 691, 703, 704). It was equally within the power of the state to create tax districts to meet the authorized outlays. The Legislature, unless restricted by the State Constitution, can create such districts directly, or, as in this case, it may provide for their institution through a proceeding in the court in which the parties interested are cited to appear and present their objections, if any. The propriety of a delegation of this sort was a question for the state alone."

Illinois Central Railroad Co. v. Decatur, 147 U. S. 190.

The question there involved was whether an act of the State of Illinois, incorporating the railroad and exempting it from taxation, would also exempt it from the payment of a municipal assessment laid for the purpose of grading and paving a street. We do not see how the decision in that case constitutes any precedent for the result contended for by the appellant in the instant case.

Kansas City Southern Railway Co. v. May, 2 Fed (2d) 680.

This was a case which originated in the District Court of the United States for the Western District of Arkansas, in which it was sought by injunction to have certain

assessments against a railroad declared void. The district was a special assessment benefit district. But the important fact in the case, and the one upon which the decision of the Court of Appeals turned, was that officials of the district had been guilty of a deliberate fraud in agreeing to lower the assessment of benefits against the railroad to a certain percentage of the total, and afterwards lowering the assessments on the owners of other property in the district so that the proportion of the burden resting upon the railroad was unchanged. On account of this deliberate fraud the contentions of the railroad were sustained, but both the opinion and the judgment took care to protect the rights of the holders of the outstanding bonds of the district.

Kansas City Southern Railway v. Ogden Levee District, 15 Fed. (2d) 637.

A levee district was organized by the Legislature of Arkansas by a special act. It was not an ad valorem district. Here the ruling of the Court of Appeals did not result in destroying the legality of a bond issue, nor the organization of the district, but merely resulted in correcting an inequality which originated in the peculiar facts of the case, palpably arbitrary and discriminatory, and therefore violative of the Fourteenth Amendment.

Kansas City Southern R. Co. v. Road Imp. Dist. No. 3, 266 U. S. 379.

This case is doubtless cited by appellant for the abstract proposition that it is only where there is manifest and un-

reasonable discrimination in fixing benefits that a legislative determination can be said to contravene the equal protection clause of the Constitution. Because it was there held, among other things, that, in the case of a railroad, benefits may consist of gains from increased traffic reasonably expected to result from the improvement. The district was a special benefit assessment district. And the holding was that the objections made to the assessment on constitutional grounds were not well taken.

Kansas City Southern R. Co. v. Road Imp. Dist. No. 6, 256 U. S. 658.

This also was a special assessment district where the assessments were to be based upon benefits. But it was also a district where, under the statute, a duly-appointed board divided the lands in the district into five zones, ascertaining benefits according to a fixed proportion of values in the different zones. The railroad's property in the district was, however, assessed according to a different principle, which resulted in the gross discrimination which occasioned the reversal of the judgment below. In other words, two different methods of ascertaining benefits were adopted. This Court, however, in speaking of the general rule that a state legislature may create taxing districts, said: "Ordinarily, the levy may be upon lands specially benefited according to value, position, area, or the front-foot rule" (page 660, citing cases).

We would remark that the instant case is not a special benefit district, but if it were, then the Legislature of

Mississippi could have provided that the assessments could be levied upon the lands specially benefited according to value, or according to either of the other methods pointed out by this Court. Even, therefore, on the assumption of the appellant that the Oldham Road District is a special benefit district, its argument, we respectfully submit, falls to the ground.

Louisville Gas & E. Company v. Coleman, 277 U. S. 32.

This case had nothing to do with special taxing districts. It arose on a statute of Kentucky which required the payment of a tax upon the recording of mortgages not maturing within five years but exempting mortgages maturing within that period. No further comment is necessary.

Memphis & Charleston Railway Company v. Bullen.

This is the case now at bar.

Missouri Pacific R. Co. v. Mitchell County, 110 Kansas 582, 204 Pac. 729.

This is another special assessment benefit district where the benefits were ascertained according to zones. A reading of the decision shows that the facts are radically different from those of the case at bar; and that the principles of law which were there invoked and applied were those appropriate to a special benefit district, but not to an ad valorem district.

Missouri Pacific Railroad Company v. Road Improvement Dist., 288 Fed. 502.

This was a decision by the Circuit Court of Appeals of the Eighth Circuit. The District was a local assessment benefit district created by a legislative act of Arkansas. It was not an ad valorem district. A reading of the Court's opinion discloses the fact that it was largely because this was a local assessment district that the discrimination appeared so glaring, and because the legislative act seemed to carry the intention that it should be real estate that was to be assessed for the benefits which the Commissioners might find would accrue to it, and because the railroad's property had been assessed to at least 60 per cent of its value, while other property in the district had been assessed much lower, farm lands at not exceeding 15 per cent to 25 per cent. In other words, there was actual discrimination against the railroad in the all-important matter of the ascertainment of benefits. No such showing has been made in the present case, as to the ad valorem assessments made by the State of Mississippi against the Memphis & Charleston Railroad.

Missouri Pacific Railroad Company v. Western Crawford Road District, 266 U. S. 187.

This was another Arkansas special benefit improvement district created by a special act of the State Legislature. We are at a loss to understand why the case is cited by appellant, because this Court there held that a state may

defray the cost of constructing a highway, in whole or in part, by means of special assessments upon property specially benefited thereby, but that it is not obliged to do so; that road building is a public purpose which may be effected by general taxation, and that the cost may be defrayed out of state funds, or a taxing district may be created to meet the authorized outlay, and that "the Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed" (p. 190). And the opinion ends with the statement that there was no suggestion of that flagrant abuse or purely arbitrary exercise of the taxing power against which the Federal Constitution affords protection.

Myles Salt Company v. Iberia Drainage District, 239 U. S. 478.

This was a Louisiana drainage district, organized by a police jury under a general statute of the state. But the complainant's land rose so high above the lands that were to be benefited that they could in no way be benefited themselves, and this action was held to have been palpably arbitrary. We need only remark that that is not this case.

Prather v. Googe, 108 Miss. 670.

This case is discussed elsewhere in this brief.

Quaker City Cab Company v. Pennsylvania, 277 U. S. 389.

This is another case which does not involve the taxation,

or the methods of taxation, in a road district. The tax complained of was a state tax laid against a cab company.

Road Improvement District No. 1 v. Missouri Pacific R. Co., 274 U. S. 188.

This was a special assessment district where benefits accruing to the railroad were based, not only on its real estate, but also on its rolling stock and other personal property; whereas benefits to other property were levied against real estate only. That is to say, the railroad was the only taxpayer against whom benefits were assessed in this peculiar manner. There were concurrent findings of two courts below of facts showing the assessment to be arbitrary and unreasonably discriminatory; and these were accepted by this Court, they not being clearly erroneous. The case is distinguished from the case now at bar because this is an ad valorem district and no question as to the method of ascertaining special benefits is involved. Furthermore, there have been two findings of courts below (the state courts) which sustained the general ad valorem tax against the railroad.

St. Louis & Southwestern Railway Co. v. Nattin, 277 U. S. 157.

This case is discussed at length in other parts of this brief.

Spencer v. Merchant, 125 U. S. 345.

The subject matter of this case was a street assessment in New York. It was held that the assessment under the

statute was not a taking of property without due process of law in violation of the Fourteenth Amendment.

Standard Pipe Line Co. v. Highway District, 277 U. S. 160.

Here a road constructed in a special assessment district cost less than $9,000 per mile. An interstate oil-pipe line which traversed the district was assessed for benefits at $5,000 per mile. The ruling was that while the pipe line may have received some small benefit from road improvements, the assessment actually made was arbitrary and unreasonable in amount. The situation, however, of the Memphis & Charleston Railroad as regards the Oldham Road District is a very different matter. Its tax is approximately $450.00 per year; whereas its annual revenue originating in the district is approximately $250,000.

Thomas v. Kansas City Southern Railway, 261 U. S. 481.

This was a drainage district of Arkansas. The railroad was not assessed for benefits according to the same method as other property in the district. In the case at bar, however, only one method, ad valorem, has been resorted to.

Valley Farms v. County of Westchester, 261 U. S. 155.

The tax involved here was for the construction and operation of a sewer. The tax was based on special bene-

fits, and was not ad valorem in character. The judgment of the Court below was affirmed.

CONCLUSION.

On all of the facts, as well as upon the principles laid down in the adjudicated cases, even those cited by the appellants, the judgment of the Supreme Court of Mississippi should be affirmed.

Respectfully submitted,

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We hereby certify that we have on this day mailed two copies of the within and foregoing brief, postage prepaid, to counsel for appellant at their regular post-office addresses respectively.

To Ely B. Mitchell, Esq., Corinth, Mississippi, and
To Messrs. S. R. Prince and John B. Hyde,
c/o Southern Railway System,
Washington, D. C.

Witness our signatures on this, the 11th day of January, A. D. 1930.

W. W. Magruder,
Benjamin H. Charles.